Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

IN RE: THEODORE B. GOULD,

Petitioner,

On Petition For A Writ Of Mandamus
To The United States Court Of Appeals
For The Eleventh Circuit,
Circuit Judge Rosemary Barkett
Circuit Judge Stanley F. Birch, Jr.
Circuit Judge Joel F. Dubina

PETITION FOR A WRIT OF MANDAMUS

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100 pp

QUESTION PRESENTED

Whether mandamus should be issued to the United States Court of Appeals for the Eleventh Circuit for (1) abuse of judicial power in causing the dismissal as moot of a cause of action concerning the provisions of a confirmed plan which (a) failed to comply with the plain language of the requirements of 11 U.S.C. § 1129, *see, In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990); *also, Smith v. Bank of New York*, 161 B.R. 302 (Bkrtcy. S.D Fla. 1993), and (b) violated the rules of equity jurisprudence applicable in federal courts that a conveyance is fraudulent unless the sale of property is *bona fide* and made upon full consideration, see Story, *Treatise on Equity Jurisprudence, vol. I*, in reliance on a prior mootness ruling cited as *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988), which conflicts with the uniform precedent of the other courts of appeals; and for (2) the abandonment of the court's duty to have an impartial panel exercise jurisdiction to hear on the merits an appeal of a lower court's order denying claims alleging fraud, conspiracy, and breach of fiduciary duty.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS OF OTHER COURTS 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

The Parties and the Chapter 11 Proceedings 2

The Postconfirmation Proceedings 6

This Proceeding 16

REASONS FOR GRANTING THE WRIT 24

1. The Eleventh Circuit's Judgment Is An Abuse Of Judicial Power And An Abandonment Of The Court's Duty 25

2. The Eleventh Circuit's Miami Center Ruling Is In Conflict With The Bankruptcy Mootness Doctrine Adopted By The Other Courts Of Appeal 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Bessemer City, 105 S.Ct. 1504 (1985)..... 9

Baker v. Drake, 35 F.2d 1348 (9th Cir. 1994)..... 28

Bank of New York v. O&Y Fla., Gould, and Miami Center Joint Venture (unreported), No. 85-3430-Civ-CCA (S.D. Fla., June 23, 1986)..... 5

Bender v. Williamsport Area School District, 475 U.S. 534 (1986)..... 25

Central States, Southeast and Southwest Pension Fund v. Central Transport, Inc., 800 F.2d 92 (4th Cir. 1988)..... 28

Church of Scientology v. United States, 113 S.Ct. 447 (1992)..... 28

Cohens v. Virginia, 6 Wheat 264 (1821)..... 26

Colorado River Water & Conservation Dist. v. United States, 424 U.S. 800 (1976)..... 26

DeBeers Consolidated Mines Ltd. v. United States, 325 U.S. 212 (1945)..... 26

Dodge v. Wollsey, 59 U.S. 331 (1856)..... 25

Guaranty Trust Co. v. York, 326 U.S. 99 (1945)..... 25

Holywell Corporation v. Smith, 112 S.Ct. 1021 (1992)..... 2

Holywell Telecommunications Company v. City National Bank of Miami, as trustee for M C Holdings Partners, et al., No. 94-5219 (11th Cir., December 21, 1995)..... 15

In re AOV Industries, Inc., 792 F.2d 1140 (D.C. Cir. 1986).....27, 28

TABLE OF AUTHORITIES – Continued

Page

In re Chateaugay Corp., 10 F.3d 944 (2nd Cir. 1993) . . 27, 29

In re Continental Casualty Co. v. Associated Plastics, Inc., 347 So.2d 822 (Fla. 3rd DCA 1977) 25

In re Holywell Corp., 51 B.R. 56 (Bkrtcy., S.D. Fla. 1985) 3

In re Holywell Corp., 54 B.R. 41 (Bkrtcy., S.D. Fla. 1985) 3

In re Holywell Corp., 59 B.R. 340 (S.D. Fla. 1986) 9

In re Holywell Corp., 75 B.R. 793 (Bkrtcy., S.D. Fla. 1987) 11

In re Holywell Corp., 93 B.R. 780 (S.D. Fla. 1988) 18

In re Holywell Corp., 493 U.S. 1057 (1990) 18

In re Holywell Corp., 498 U.S. 1041 (1990) 22

In re Holywell Corp., 874 F.2d 780 (11th Cir. 1989) 14

In re Holywell Corp., 881 F.2d 1086 (11th Cir. 1989) 18

In re Holywell Corp., 901 F.2d 931 (11th Cir. 1990) . . 2, 15

In re Holywell Corp., 911 F.2d 1539 (11th Cir. 1990) 4

In re Holywell Corp., 913 F.2d 873 (11th Cir. 1990) 17

In re Holywell Corp., 923 F.2d 865 (11th Cir. 1991) 15

In re Joshua Slocum, Ltd., 922 F.2d 1081 (3rd Cir. 1990) 26

In re Matos, 790 F.2d 864 (11th Cir. 1986) 13

TABLE OF AUTHORITIES – Continued

Page

In re Roberts Farms, Inc., 652 F.2d 793 (9th Cir. 1981) 28

In re Sewanee Land Coal & Cattle, Inc., 735 F.2d 1294 (11th Cir. 1984) 13

In re Sun Valley Ranchers, Inc., 823 F.2d 1373 (9th Cir. 1987) 29

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 23

Markstein v. Massey Associates, Ltd., 763 F.2d 1325 (11th Cir. 1985) 12, 13

Matter of Combined Metals Reduction Co., 557 F.2d 179 (9th Cir. 1977) 28, 29

Matter of Garfinkle, 672 F.2d 1340 (11th Cir. 1982) 25

Matter of King Resources Co., 651 F.2d 1326 (10th Cir. 1980) 28

Matter of Springpark Associates, 623 F.2d 1377 (9th Cir. 1980) 29

McCarthy v. Madigan, 112 S.Ct. 1081 (1992) 26

Miami Center Limited Partnership v. Bank of New York, 820 F.2d 376 (11th Cir. 1987) 11

Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 12

National Surety Co. v. Coriell, 289 U.S. 426 (1933) 29

Norwest Bank Worthington v. Ahlers, 108 S.Ct. 963 (1988) 25

TABLE OF AUTHORITIES – Continued

Page

O&Y Fla. Equity Corp. And Miami Center Joint Venture v. Bank of New York, No. 85-3230-Civ-Atkins, March 24, 1987 (Unreported) 10

Peninsular Land Co. v. Howard, 149 Fla. 772, 6 So.2d 384 (1941) 26

Protective Committee for Indep. Stockholders of TMT v. Anderson, 340 U.S. 414 (1968) 29

Roche v. Evaporated Milk Ass'n, 319 U.S. 21 (1943) 26

Russell v. Lane, 890 F.2d 947 (7th Cir. 1989) 23

Salve Regina College v. Russell, 111 S.Ct. 1217 (1991) 19

Smith v. Bank of New York, 161 B.R. 302 (Bkrtcy., S.D. Fla. 1993) 6, 30

United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964) 9

STATUTES

11 U.S.C. § 363(f)(2) 13

11 U.S.C. § 363(m) 12

11 U.S.C. § 365 11

11 U.S.C. § 506(b) 15

11 U.S.C. § 1122 ..... 9, 10, 27

11 U.S.C. § 1123 10

11 U.S.C. § 1127 ..... 17, 23

§ 1127(a) 26

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 1127(b) 7, 27

11 U.S.C. § 1128(a) 3

§ 1128(b) 3

11 U.S.C. § 1129 ..... 9, 10, 12, 27

§ 1129(a)(1) 17, 27, 29

§ 1129(a)(2) 29

§ 1129(a)(9)(B)(ii) 5

§ 1129(a)(11) 29

§ 1129(b) 10

§ 1129(b)(1) 14, 27, 29, 30

18 U.S.C. § 1962 3

28 U.S.C. § 157(b)(1) 15

28 U.S.C. § 455(a) 23

28 U.S.C. § 455(b)(1) 12

29 U.S.C. § 1651(a) 1

OTHER MATERIALS

33 Fla. Jur. § 111 18

33 Fla. Jur. § 118 18

Constitution of the United States 25

Federal Rules of Appellate Procedure 3(c) 23

TABLE OF AUTHORITIES – Continued

Page

Federal Rules of Civil Procedure, Rule 52(a) 9
Fla. Stat. Section 95.11(3)(I) and (o) (1993)..... 18
H.R. 31, 95th Cong., 1st Sess (1975)..... 10
S.Rep. No. 989, 95th Cong., 2nd Sess 74 (1978)..... 10
Story, *Equity Pleadings*, Ch. XIV, §§ 796, 797, 798 15
Story, *Treatise on Equity Jurisprudence*, vol. 1 25
11th Circuit Rule 35-6 1

PETITION FOR A WRIT OF MANDAMUS

Theodore B. Gould, *pro se,* respectfully petitions for a writ of mandamus (1) to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case; (2) to enforce the rules of equity jurisprudence applicable in federal courts; (3) to preclude the lower court's usurpation of judicial power in reliance on a mootness doctrine, for which there is no statutory authority, and is in conflict with the uniform precedent adopted by the other courts of appeal; (4) the application of which has sanctioned the fraudulent conveyance of property without consideration; and (5) to compel the lower court to exercise its jurisdiction to hear on the merits an appeal of a district court's order denying claims, alleging fraud, conspiracy and breach of fiduciary duty.

OPINIONS OF OTHER COURTS

The opinion of the court of appeals (App. at 3-11) is unreported. The opinions of the district court (App. at 12-43) are unreported. The bankruptcy court's judgment (App. at 20-40), its order on rehearing (App. at 41-43), and its order on remand (App. at 44-56), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1997 (App. at 3), and a timely suggestion of rehearing *in banc* (which is treated by the Eleventh Circuit as a petition for rehearing as well, 11th Cir. R. 35-6), was denied on August 29, 1997 (App. at 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

STATUTORY PROVISIONS INVOLVED

The pertinent text of the statutory provisions involved in this petition is set forth and attached in the appendix (App. at 57-61).

STATEMENT

The Parties and the Chapter 11 Proceedings

This petition arises from proceedings under title 11 and is related to separate cases under title 11, which the petitioner commenced with certain affiliated parties on August 22, 1984[1] in response to foreclosure proceedings against the Miami Center initiated by the Bank of New York ("Bank"), the project's interim lender under certain tri-partite buy-sell agreements with permanent lenders to purchase the notes and mortgages issued by the Bank's borrowers, Chopin Associates ("Chopin"), and the Miami Center Limited Partnership ("MCLP").

Under the mortgage documents, the Bank's liens were *subordinate* to the ground rent and real estate taxes payable by MCLP to Chopin in accordance with a 99-year ground lease entered into on March 27, 1980.[2] The mortgages also required the Bank to issue non-disturbance agreements to tenants of the Miami Center's office building.[3] The three original notes issued to the Bank, in the total face amount of $112,500,000, defined the contract rate as "the minimum commercial lending rate charged from time to time by the Bank of New York for 90-day loans to responsible and substantial commercial borrowers," *In re Holywell Corp.*, 901 F.2d 931, 933 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713

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[1] The background of the Chapter 11 proceedings is described in this Court's opinion, cited as *Holywell Corporation v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 1023 (1992).

[2] Under the substantive consolidation provision of the Bank's plan, "all claims, if any, relating to the ground lease between Chopin and MCLP" were eliminated, Art. II, *Substantive Consolidation*, although the mortgage documents provided "the holder [Bank] of any first mortgage . . . on the Lessee's [MCLP] leasehold estate hereunder and in any event any such mortgage . . . placed on the Lessor's [Chopin] fee estate in the leased premises shall be subject and subordinate to this [ground] lease."

[3] The Bank's refusal to issue nondisturbance agreements to tenants adversely affected leasing the Miami Center's office building and reduced income before debt service, forcing MCLP into bankruptcy.

(1991), compared with various additional notes made on and after May 26, 1982, to December 31, 1983, without commitments from permanent lenders to purchase the notes in the total face amount of $85,000,000, in which the contract rate was defined as "the prime commercial lending rate of the Bank of New York as announced to be in effect from time to time."[4]

In consideration of the Miami Center Joint Venture ("MCJV"), a general partnership which the petitioner formed with Olympia & York Florida Equity Corporation ("O&Y Fla."), leasing certain furniture, fixtures, and equipment ("FF&E") to MCLP in order to satisfy the requirements of the Metropolitan Life Insurance Company's permanent debt commitment, *In re Holywell Corp.*, 51 B.R. 56, 58 (Bkrtcy. S.D. Fla. 1985), the Bank agreed to file UCC-1 forms subordinating its liens to MCJV's rights under the FF&E leases, and, because the Bank exercised sole control of MCLP's disbursements, "to continue the leases in full force and effect" in the event of MCLP's default.

On August 8, 1985, the Bank's amended plan submitted on behalf of the debtors was confirmed *without* a confirmation hearing in accordance with the requirements of 11 U.S.C. § 1128(a), App. 58, and various modifications of the Bank's plan were approved without a hearing, in which MCJV and the debtors, as parties in interest, could object to confirmation, App. 58, 11 U.S.C. § 1128(b). *In re Holywell Corp.*, 54 B.R. 41 (Bkrtcy. S.D. Fla. 1985).

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[4] After the commencement of the proceedings, the debtors filed a lawsuit against the Bank in district court, alleging breach of contract, usury, fraud, and unfair dealing for (a) refusing to sell its notes and mortgages to the permanent lenders under the tripartite buy-sell agreement, resulting in damages attributable to forfeited deposits of $3,600,000 for MCLP and $1,120,000 for Chopin; (b) refusing to issue non-disturbance agreements to the Miami Center office building's tenants in violation of the mortgage documents; (c) charging interest in excess of the amount due under the loan documents; and (d) violation of § 1962 of Title 18, *Crimes and Criminal Procedures* (Racketeer Influenced And Corrupt Organizations).

Article IV, *Means For Execution Of The [Bank's] Plan,* required the trustee to "take all steps and to make all payments, from such cash [the Miami Center's sale proceeds] (and, if necessary, from the Washington Proceeds), to exercise the purchase option in the MCJV FF&E leases, and to obtain title to the FF&E covered by the MCJV FF&E leases." Total available cash to purchase MCJV's FF&E on October 10, 1985, was *$43,205,044.68,* less the funds required to pay claims against Holywell's estate, 8, n. 14, *infra.*

Article IV, *Treatment Of Claims And Distribution,* of the Bank's plan subordinated the claims of MCJV and O&Y Fla. based on classification as insiders and provided that such "Allowed Class 7 Claims will be paid from the MCJV Property."

Bankruptcy Judge Britton, the original presiding judge, rejected the petitioner's contentions as not "requir[ing] discussion," 54 B.R. at 43, that (a) the creation of the Miami Center Liquidating Trust was a fraudulent scheme to evade the payment of income taxes, *see, In re Holywell Corp.,* 911 F.2d 1539 (11th Cir. 1990),[5] that (b) the elimination of Chopin's claim for the payment of ground rent from MCLP's estate, which had a priority superior to the Bank's liens, and (c) the trustee's sale of property, *without* consideration to the Bank's alter-ego as the Miami Center's buyer, was a fraudulent conveyance in violation of the rules of equity jurisprudence applicable in federal courts.

The bankruptcy court approved the Bank's stipulation with the creditors' committees of Holywell and MCLP, as amended, *limiting* to $2,000,000[6] the payment of MCJV's impaired claim for unpaid

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[5] The Eleventh Circuit held "[w]e dismiss, as moot, the allegation that the bankruptcy court lacked authority to confirm the Plan, and the allegation that the Bank of New York acted fraudulently in obtaining approval of the Plan."

[6] After the Bank amended its plan as an inducement to the Unsecured Creditors' Committees' withdrawal of their objections, the Bank filed an adversary complaint against the petitioner, O&Y Fla., and MCJV, alleging that the FF&E leases were (a) "unperfected financing agreements," (b) the

rent plus interest as late charges, in the amount of $7,338,152, until the Bank and unsecured creditors with junior claims had been paid in full, plus interest, contrary to the Absolute Priority rule, App. 60, 11 U.S.C. § 1129(a)(9)(B)(ii).

The Second Amendment's Funding Agreement of the Bank's plan, which the bankruptcy court also approved, *ex parte,* provided that the Bank would loan the trustee, upon written request, an amount *not* exceeding *$14,417,679* ("Commitment Amount") to pay MCJV's claims for unpaid rent and the purchase of the FF&E, subject to the condition that "[t]he Commitment shall be reduced by the amount of any payments made by the Trustee from time to time in respect to the MCJV FF&E Lease Claim." Compare App. 26. The Funding Agreement provided that repayment of the Bank's loan to the Trustee would be secured by a Trustee's Certificate with "a first lien and security interest in all of the Trust Property, and proceeds thereof, including without limitation all right, title and interest of the Trustee in the Award,[7] in MCJV,[8] and the proceeds thereof."

FF&E was owned by MCLP, and (c) the FF&E was subject to the Bank's liens. The bankruptcy court's judgment quieted MCJV's title and held that "the bank's disclosure statement supporting its plan describes and treats the leases as leases, not as disguised conditional sales." 51 B.R. at 58. Compare App. 24. The district court affirmed and held:

> The Bank filed the UCC-1 forms reflecting and recording priority rights of MCJV as owner. *Such rights were superior to those of the bank as well as to general and unsecured creditors.* (Emphasis added)

Bank of New York v. O&Y Fla., Gould, and Miami Center Joint Venture (unreported), No. 85-3430-Civ-CCA (S.D. Fla., June 23, 1986), *affirmed,* No. 86-5609 (11th Cir., October 12, 1988), p. 3.

[7] The arbitration panel's award, entered on June 1, 1984, imposed $10 million in damages on O&Y Fla. for default under the Joint Venture Agreement and granted to the petitioner the right to purchase O&Y Fla.'s partnership interest for $10,000.00, subject to simultaneous repayment of $46 million of MCJV's debt.

[8] The petitioner had not granted the Bank a security interest in MCJV and the fair market value of its assets exceeded $116 million as of November 24, 1984.

The debtors and MCJV filed separate appeals of the Bankruptcy court's order confirming the Bank's amended plan.

The Postconfirmation Proceedings

Notwithstanding that the Bank's plan provided for the Miami Center Closing Date to be "45 days from the Effective Date," Article I, *Definitions*, after the debtors failed to post a $50 million supersedeas bond with a prohibitive 90-day maturity to stay the bankruptcy court's order confirming the Bank's amended plan,[9] the Bank granted the trustee an indemnity, holding him harmless for his actions under the plan's provisions and his execution of the Miami Center's contract of sale as an inducement to commence distribution and cause substantial consummation of the Bank's plan, without seeking the Court's instructions, or a ruling from the Internal Revenue Service ("IRS") concerning difficult questions of judgment. *See, Smith v. Bank of New York*, 161 B.R. 302 (Bkrtcy. S.D. Fla. 1993).[10]

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[9] The bankruptcy court had set the supersedeas bond at $140 million, because "if an order of this Court is not superseded and that order is performed, then it cannot be challenged any further. . . . and if we had been able to carry out the entire plan very quickly, there would never have been an appeal because they couldn't post the bond," Bkrtcy. S.D. Fla., *Transcript, Ex Parte Conference*, Judge Britton, May 15, 1987.

[10] The bankruptcy court held:

> [t]he wording of the indemnity agreement itself and the more credible testimony presented at trial as to the parties intentions make clear that the bank agreed to indemnify the Trustee for any liability incurred as a result of implementation of the plan, including tax obligations imposed by law upon the Trustee. 161 B.R. at 305.

Irving M. Wolff, the trustee's former attorney, has answered certain interrogatories as follows:

> [W]e obtained the letter of indemnity so that if any claims were made upon the Liquidating Trustee for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing, the

In reliance on the Bank's indemnity, the trustee sold the Miami Center to M C Holdings Partners, the Bank's alter-ego, on the plan's Effective Date of October 10, 1985, and after the Bank agreed to (a) the trustee's audit and examination of the loan amount which the Bank's attorneys had taken as a credit against the Miami Center's purchase price, 8, n. 12, *infra,* and (b) modification of the contract of sale to provide that the "Purchaser recognizes that the Seller, Miami Center Liquidating Trust, can deliver, in accordance with this Agreement, only such title, items, chattels, and matters that it has received by operation of law from the Debtors and Debtors in Possession, and that this Agreement is governed by said limitation," par. 25, the trustee consented to the following postconfirmation modifications of the Bank's plan, in violation of 11 U.S.C. § 1127(b), App. 58:

(1) An escrow was established for the payment of disputed real estate taxes for 1982-1984, plus interest through October 1987, in the amount of *$7,006,114.65,* and the Bank was allowed to take a credit of *$4,291,625.46* for the estimated 1985 taxes due, instead of paying the taxes under protest,[11] despite the fact that the statutory liens for real estate taxes did *not* attach to MCJV's FF&E.

(2) The Second Amendment's Funding Agreement was modified to provide:

> [s]hould [the Bank] be required to pay and discharge the MCJV FF&E lease claims from any source other than under this Funding Agreement for any reasons whatsoever, including but not limited to court order, *then it shall have no obligation to fund any sums hereunder but it shall be entitled to*

> question and payment of the allowed superiority claims, the accountability to the unfiled subsidiaries, and the question of the charging of postbankruptcy interest, the Liquidating Trustee would be completely indemnified. . . .

[11] The trustee's consent to the Bank's establishment of this escrow reduced the funds available to pay claims against MCLP's estate in the amount of $4,636,766.89.

> *receive a Trustee's Certificate* . . . (Emphasis added).

The Bank's attorneys modified the Second Amendment's Funding Agreement, because the district court had required the Bank to post a corporate surety bond, in the amount of $15,000,000, on or before October 10, 1985, to secure the payment of the amount of MCJV's claims and provide for the purchase of the leased property "plus interest, damages for delay, and costs," in the event that the order confirming the Bank's amended plan was reversed on appeal.

(3) The Contract of Sale was modified to impose a lien on the cash proceeds of the Miami Center's sale and on any additional funds in the trustee's possession.

After creation of the escrow for disputed real estate taxes and the credits taken by the Bank, the net proceeds of the Miami Center's sale were $1,162,394.95,[12] and the remaining cash and securities attributable to the sale of the Washington Properties, transferred to the trustee on October 11, 1985, were *$29,737,179.48*,[13] representing *$30,899,574.43*. The total principal amount of the claims of unsecured creditors against the various bankruptcy estates was *$26,052,613.82*, including MCJV's claim for unpaid rent plus interest as late charges of $7,338,152 as of October 10, 1985.

On January 29, 1986, the bankruptcy court amended its order confirming the Bank's plan *nunc pro tunc* and adopted verbatim the Bank's proposed findings of fact and conclusions of law concerning the "modified form of substantive consolidation[14] proposed by the plan," 54 B.R. at 43, and the

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[12] The total credits taken by the Bank included interest, which Arthur Andersen & Co., the trustee's accountant, estimated was *$13,130,082.27 in excess of the amount due under the loan documents*, 7, *supra*.

[13] The Washington Proceeds included U.S. Treasury bills maturing at a par value of $21,899,000.00 between March 13-27, 1986, which the trustee sold prematurely, causing lost interest income of $725,714.98.

[14] The plan's "modified form of substantive consolidation" required that the trustee pay the claims against Holywell Corporation's ("Holywell") estate, in the amount of *$3,492,309.90*, and distribute as a dividend the

subordination of the valid claims of MCJV and Holywell's nondebtor subsidiaries based on classification as insiders, without the testimony of witnesses, physical or documentary evidence, in violation of Fed.R.Civ.P., Rule 52(a),[15] despite the district court's factual finding in its remand that "[t]here also seems to be a paucity of facts emanating from evidentiary hearings upon which the rulings should be founded." Nevertheless, the district court, quoting *Anderson v. Bessemer City,* 105 S.Ct. 1504, 1511 (1985), granted deference of the "clearly erroneous" standard of review to the bankruptcy judge's adoption verbatim of the Bank's proposed findings of fact, *In re Holywell Corp.,* 59 B.R. 340, 344, n. 3 (S.D. Fla. 1986), and affirmed the bankruptcy court's order confirming the Bank's amended plan, without resolving the question of whether 11 U.S.C. § 1129 granted authority to a bankruptcy judge to confirm a plan which wrongfully subordinated MCJV's claims for unpaid rent based on classification as an insider, in violation of 11 U.S.C. § 1122, *see,* 913 F.2d at 880.[16] Instead, the district court held that the issue of whether

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remainder of Holywell's cash of *$24,314,219.28* to the Miami Center Liquidating Trust for the trustee's use to pay claims against the other bankruptcy estates. "The plan said nothing about whether the trustee had to . . . pay any income tax due," 112 S.Ct. at 1024, notwithstanding that the bankruptcy court's cash collateral order, issued on the Bank's motion before its plan was filed, required the determination and payment of taxes attributable to the income from the sale of the Washington Properties, 161 B.R. at 304.

[15] *See, United States v. El Paso Natural Gas Co.,* 376 U.S. 651, 656-657 (1964) ("Rule 52 says the court shall prepare the findings. . . . 'Many courts simply decide the case in favor of the plaintiff or defendant, have him prepare the findings of fact and conclusions of law and sign them. . . . This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a non-compliance with Rule 52 specifically. . . . "

[16] In the Bank's appeal of the district court's order reversing the confirmation order with respect to MCJV's claims and interests, the Eleventh Circuit held that "if the classification scheme violates basic priority rights, the plan cannot be confirmed." 913 F.2d at 880.

MCJV's claims had "been wrongly subordinated (or classified) is one which the [petitioner] debtors/appellants lack standing to assert because they are not parties actually injured by this classification," 59 B.R. at 349, and the issue is "not a proper matter for adjudication by this Court," *Id.* at 350, despite the fact that the petitioner was the beneficial owner of a general partnership interest in MCJV, *Id.* at 342.

In MCJV's separate appeal of the bankruptcy court's order confirming the Bank's amended plan, the district court held:

> [t]he plan must satisfy the requirements of code sections 1122, 1123, and 1129. While the Bank feels that the plan's classification structure fulfills all of these code requirements I disagree. . . . [T]he Bank argued that the MCJV claim is partially an equity interest. Yet, even if this assertion were true, it would not justify the subordination of a valid claim.

O&Y Fla. Equity Corp. and Miami Center Joint Venture v. Bank of New York, No. 85-3230-Civ-Atkins, March 24, 1987 (Unreported). The court held, citing 11 U.S.C. § 1129(b), App. 60, that "if the plan unfairly creates too many or too few classes, or violates basic priority rights, the court cannot confirm the plan," and noted that "Congress specifically rejected a provision which would have automatically subordinated certain insider claims as a matter of law. See S.Rep. No. 989, 95th Cong., 2nd Sess. 74 (1978); H.R. 31, 95th Cong., 1st Sess. (1975)," *Id.* at n. 11.

On May 15, 1987, Bankruptcy Judge Britton caused the dismissal of the trustee's attorney in an *ex parte* conference,[17] because "Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan

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[17] After Bankruptcy Judge Britton was forced to release a transcript of the *ex parte* conference, he was required to recuse himself for his comments, which were evidence of pervasive personal bias against the petitioner and O&Y Fla.

which this Court confirmed is defective[18] and that there are other obstacles of a legal nature to seeing his way clear to carrying out the confirmation order." Bkrtcy. S.D. Fla. (In Chambers), *Transcript*, p. 3.

Prior to Mr. Wolff's dismissal as his attorney, the trustee represented that (a) the Bank had *not* paid for the FF&E, at the Miami Center's Closing, (b) the trustee could not exercise the purchase option to acquire the FF&E and convey title to the Miami Center's buyer, because the Bank's plan subordinated MCJV's claim, and, thus, the leases stood rejected as a matter of law in accordance with 11 U.S.C. § 365 at the time of confirmation of the Bank's plan, *In re Holywell Corp.*, 75 B.R. 793, 794 (Bkrtcy. S.D. Fla. 1987), and (c) the Bank's alter-ego as the Miami Center's buyer agreed to modify the Contract of Sale to provide that the trustee could "deliver, in accordance with the Agreement, *only such title, items, chattels and matters that it has received by operation of law from the Debtors and Debtors in Possession.*" (Emphasis added).[19]

On June 22, 1987, the Eleventh Circuit dismissed as moot the debtors' appeal of the district court's order affirming the bankruptcy court's confirmation order and the dismissal of the related lawsuit against the Bank alleging fraud, breach of contract, unfair dealing, and RICO violations, *Miami Center Limited Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987), on the grounds that "[t]he proper standard to apply in this case is whether the reorganization plan has been so

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[18] In a colloquy before this court, the trustee's present attorney replied to the Court's question that "many plans have been undone because . . . there was a superior lien that was not acknowledged at the time the plan was executed":

> STETTIN: Clearly, there are methods by which a plan can be undone. . . . This plan has been substantially consummated. . . . [However] [t]he plan would not have been confirmable because one of the requirements under Section 1129 is that the plan be shown to be capable of successfully being carried out. U.S. Supreme Court, *Transcript*, December 4, 1991, p. 21.

[19] Contract of Sale, October 10, 1985, p. 36, par. 25.

substantially consummated that effective relief is no longer available," 820 F.2d at 379. The Eleventh Circuit held that:

> [b]ecause the Bank has complied with its obligations under the reorganization plan, and because the trustee has paid or reserved funds to pay all creditors other than debtor-affiliated creditors, this court cannot provide effective relief,

Id. at 380. The court concluded that it lacked authority to form meaningful relief for a substantially consummated plan which failed to comply with applicable law. *Id.*

Despite the fact that Bankruptcy Judge Britton had been required to recuse himself pursuant to 28 U.S.C. § 455(b)(1)[20] and the Eleventh Circuit had notice of the district court's finding that the Bank's liens were subordinate to MCJV's rights, 4-5, n. 6 *supra,* and concluded that the Bank's amended plan failed to comply with the requirements of 11 U.S.C. § 1129, 10, *supra,* the court of appeals granted deference to the recused bankruptcy judge's adoption of the Bank's proposed findings that "the bank was a good faith purchaser,"[21] *Miami Center Limited Partnership v. Bank of New York,* 838 F.2d 1547, 1554 (11th Cir.), *cert. denied,* 488 U.S. 823 (1988). The court held that, notwithstanding the fact that "[t]he mootness standard is preserved in the present bankruptcy code at 11 U.S.C. § 363(m) . . . [and] [s]ection 363(m) does not apply where the debtor's assets have been sold, as here, by a liquidating trustee pursuant to a plan of liquidation," 838 F.2d at 1553, the appeal of the bankruptcy court's order confirming the Bank's amended plan had to be dismissed as moot in accordance with the Eleventh Circuit's "case law." *Id.*

The court concluded, quoting its prior opinion, cited as *Markstein v. Massey Associates, Ltd.,* 763 F.2d 1325, 1327

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[20] 28 U.S.C. § 455(b)(1) provides that a judge shall disqualify himself "[w]here he has a personal bias or prejudice concerning a party. . . . "

[21] The Eleventh Circuit held that "[t]he 'good faith purchaser' is one who buys in good faith, that is, free of any fraud or misconduct and for value and without knowledge of any adverse claim." 838 F.2d at 1554.

(11th Cir. 1985), that "[t]his rule of law [lack of power in the court to rescind sale where there has been no stay] was intended to provide finality to orders of bankruptcy courts and to protect the integrity of the judicial process upon which good faith purchasers relied," 838 F.2d at 1554. The court also relied on its mootness ruling, reported as *In re Matos*, 790 F.2d 864 (11th Cir. 1986), that:

> It is settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's or the district court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal. *Markstein v. Massey Associates*, 763 F.2d 1325 (11th Cir. 1985); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984). This rule of law, which is premised upon consideration of finality, protection of the integrity of the foreclosure sale process, and the court's inability to rescind the sale and grant relief on appeal even if the purchaser of the property is a party to the appeal, is fully applicable to this case. Accordingly, the appeal must be dismissed as moot. (Note omitted). 790 F.2d at 865-66.

Without credibility determinations based on the testimony of witnesses, made by the bankruptcy court, or documentary evidence, the Eleventh Circuit found that:

> [t]he bank bargained for and purchased the FF&E as part of the sale.[22] Because litigation was in progress over whether title to the FF&E was in lessors of the bankrupt. The bank put up $14 million to pay the lessors if they prevailed. But, since the Bank would

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[22] *Compare*, 8, *supra*, the Miami Center's net sale proceeds were $1,162,394.95; *also* MCJV did not consent to the Bank's purchase of the FF&E, *see*, 11 U.S.C. § 363(f)(2). *See also*, 8, *supra*, the Bank posted a $15 million surety bond.

> then have paid twice for the same assets,[23] it was given a trustee's certificate enforceable against assets of the estate to protect it from double payment.

838 F.2d at 1556. The court held that:

> [t]he bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated and that its fairness,[24] feasibility,[25] and propriety had been verified . . . [and] [t]he district court was required to dismiss the appeal as moot.

838 F.2d at 1557. The court concluded its mootness ruling precluded adjudication on the merits of the debtors' lawsuit against the Bank, alleging fraud, unfair dealing, breach of contract, and RICO violations, because the Bank's plan required the trustee to dismiss the lawsuit. *Id.*

The *Miami Center* mootness ruling has also been relied on to conclude that (a) "[p]assage of title of the FF&E to the liquidating trustee was part of the confirmed plan of reorganization," *In re Holywell Corp.*, 874 F.2d 780, 782 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 725 (1990); (b) the bank's unilateral determination of the loan amount and accrued interest without an accounting[26] "was included in the Bank's bargain for the purchase of the [Miami Center] project, which constituted a large part of the confirmed Plan [and] [i]t is now

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[23] *Compare*, 20, *infra*, quoting trustee's testimony; *also*, 19, *infra*, quoting district court.

[24] *Compare*, 17, *infra*, quoting 913 F.2d at 880 (the Bank's amended plan did not satisfy 11 U.S.C. § 1129(b)(1)).

[25] *Compare*, 29, *infra*, quoting 161 B.R. at 307 ("the bank's representations concerning the feasibility of the plan . . . were materially false.")

[26] The bankruptcy court's judgment in reliance on the doctrine of collateral estoppel based on certain releases allowed the Bank to take interest in excess of the amount due under the contract documents, 8, n. 12, *supra*, without an accounting.

impossible and unjust to amend the plan as consummated,"[27] *In re Holywell Corp.*, 901 F.2d 931, 934 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991); (c) although the bankruptcy court's order confirming the Bank's plan found that the Bank's claim against MCLP's estate was "undersecured," 54 B.R. at 41, and the Bank faced "a substantial loss," *Id.* at 43, the Bank was allowed to take postpetition interest of *$27,050,115.12* as a credit against the Miami Center's purchase price in violation of 11 U.S.C. § 506(b), notwithstanding that its claim was subordinate to Chopin's right to ground rent, 2, *supra*, and MCJV's ownership rights under the FF&E leases, *In re Holywell Corp.*, 923 F.2d 865 (11th Cir.), *cert. denied*, 111 S.Ct. 2259 (1991); and sanctioned (d) the trustee's conveyance *without* consideration of property owned by Holywell Telecommunications Company to the Miami Center's buyer in accordance with the substantive consolidation provision of the Bank's plan, *Holywell Telecommunications Company v. City National Bank of Miami, as trustee for M C Holdings Partners, et al*, No. 94-5219 (11th Cir., December 2[illegible], 1995) (unpublished) ("The bankruptcy court had subject matter jurisdiction over this case. *See*, 28 U.S.C. § 157(b)(1)[28]. . . . [T]he bankruptcy court did not err in relying on this court's earlier mootness rulings.")

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[27] *Compare*, Story's *Equity Pleadings*, Ch. XIV, §§ 796, 797, and 798 (when fraud, unfair dealing, and false charges are alleged as objections to a release, an account is settled *only* when the "accounts have been examined" and the conveyance of property "stands as security only for what is justly due . . . [and] if those accounts were liable to the imputation of cost upon them by the bill, the release was not a fair transaction, and ought not to preclude the court from decreeing a new account.")

[28] Holywell Telecommunications Company ("HTC") was a solvent, nondebtor company. *See*, 59 B.R. at 342. The trustee conveyed HTC's property and the assets of Holywell Leasing Company ("HTC") to the Miami Center's buyer without consideration. The original cost of the property was $8,477,405, of which $7,718,466 was the cost of the property leased to MCLP. *Id.* The remainder of HTC's property was leased to third parties.

This Proceeding

This case was commenced as an adversary proceeding by the Bank against the trustee, the petitioner, and the other debtors, in which the issuance of a Trustee's Certificate under the Second Amendment's Funding Agreement was sought for the payment made by M C Holdings Partners to MCJV on March 18, 1991 (compare App. 4, 6 & 29) in the amount of *$22,335,882.13,* including unpaid rent, the purchase option price of $4,986,900, *see,* 75 B.R. at 796, and accrued interest as late charges of *$10,010,831.13* from October 10, 1985. The trustee had failed to pay MCJV for the purchase of its property in accordance with the provisions of the Bank's plan, 4, *supra,* quoting Art. IV, *Means For Execution Of The Plan,* and the bankruptcy court's approval of the plan's wrongful subordination of MCJV's preconfirmation claims for unpaid rent and interest as late charges, 913 F.2d at 880, precluded payment to MCJV in accordance with its contractual and statutory rights.

The trustee consented to the bankruptcy court's entry of a judgment authorizing the issuance of a Trustee's Certificate to the Bank under the postconfirmation modification of the Second Amendment's Funding Agreement, 7, *supra.* The trustee did not object to the Bank's demand that the amount of the Trustee's Certificate should include the option purchase price of $4,986,900, despite the fact that the trustee had previously granted an abatement of $442,000 to the Bank for missing chattels as a Miami Center closing adjustment. The trustee *only*[29] objected that the Trustee's Certificate should not include the accrued interest paid as late charges, because the Bank's unsuccessful appeals of the various orders, quieting

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[29] In the prior proceedings before the Eleventh Circuit, concerning the Bank's appeal of the district court' order reversing the bankruptcy court's order confirming the Bank's plan with respect to MCJV's claims, the trustee argued that the bank was liable for MCJV's payment because "the bank proposed the plan of reorganization which required the Liquidating Trustee to convey title to MCJV's property to the Bank's designee at the closing on the sale of the Miami Center, *without making available to him all the funds needed to do so.*" (Emphasis added)

MCJV's title to the FF&E and concluding that the Bank's plan wrongfully subordinated MCJV's claims for unpaid rent, caused the trustee's failure to pay MCJV on October 10, 1985.

The petitioner argued that the Second Amendment of the Bank's plan was a nullity in accordance with the plain language of 11 U.S.C. § 1127, App. 58, and the mandate of the Eleventh Circuit's prior opinion, cited as *In re Holywell Corp.* (Bank of New York v. O&Y Fla., Theodore B. Gould and Miami Center Joint Venture), 913 F.2d 873 (11th Cir. 1990), which held that:

> [t]he Bank argues that the fact that debtor Gould would benefit from payment of claim 502 by virtue of his interest in MCJV and the fact that MCJV could look to Gould's equity interest in MCJV and in MCJV's property to satisfy claim 502 justify its separate classification under section 1122. We disagree." 913 F.2d at 880.

The Eleventh Circuit's prior opinion also held "the fact that claim 502 is in part an equity interest does not justify its subordination. . . . The facts in this case thus do not warrant separate classification under section 1122." *Id.*[30]

The petitioner also filed counterclaims against the Bank, alleging that the Bank was not entitled to a Trustee's Certificate, because the Bank was guilty of fraud, *inter alia,* for (a) the failure to disclose that the Bank did not pay for the purchase of MCJV's FF&E at the Miami Center's closing or (b) the Bank failed to disclose that its liens were subordinate to MCJV's rights, 4-5, n. 6, *supra,* and the Bank took MCJV's money at the Miami Center's closing, 7, *supra,* citing Miami Center's Closing Statement.

The bankruptcy judge adopted verbatim the Bank's proposed conclusions of law and held:

> [t]he debtors allege that the Bank should not recover any part of that payment under the Second

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[30] According to the Eleventh Circuit, at issue in the prior related proceedings was "whether the Bank's plan complies with the applicable provisions of title 11, namely section 1122. *See,* 11 U.S.C. § 1129(a)(1) (requiring that the plan comply with the provisions of title 11)." *Id.* at 879

> Amendment to the Plan, because, among other things, "*The Bank of New York, and its attorneys* (emphasis added) have engaged in *a pattern of fraud which was commenced in April, 1980, and has continued without abatement*" (emphasis added). The debtors' counterclaims seek $100 million, punitive damages, and other relief as against the Bank, and their cross-claims against the Trustee accuse the Trustee of a "beach of fiduciary duty and conspiracy to injure another in a trade, practice or profession." App. 31.[31]

The bankruptcy court held that the doctrines of *res judicata* and collateral estoppel barred the petitioner from relitigating claims alleging fraud, breach of fiduciary duty, and conspiracy, in reliance on *In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988), *affirmed*, 881 F.2d 1086 (11th Cir. 1989), *cert. denied*, 493 U.S. 1057 (1990), which held, in reliance on the bankruptcy court's prior judgments, that (a) "the Trustee was not responsible for the filing of federal income tax returns . . . or liable to the United States for the payment of any federal income taxes," 93 B.R. at 784, and (b) "[t]he treatment of the claims of affiliates of the Debtors is governed by the Plan, which provides for the subordinate classification of these claims [and] . . . provides a mechanism for the determination and payment of the MCJV claim." *Id.*

On rehearing, the bankruptcy court held that the petitioner's claims of breach of fiduciary duty and conspiracy against the trustee are "barred by the applicable four-year statute of limitations," section 95.11(3)(i) and (o), Fla. Stat. (1993)," App. 42.[32]

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[31] *See*, 33 Fla. Jur. § 111 ("if a trustee has breached his duties by undertaking to consent to the entry of a judgment against him that is prejudicial to the beneficiaries, equity may take jurisdiction for the purpose of specifically compelling both the trustee and those who have benefited by his breach of trust to restore the status quo and thereby undo the wrong complained of.")

[32] *Compare*, 33 Fla. Jur. § 118 ("Florida's general statute of limitations has no application to money or property held or collected by a

The bankruptcy court authorized the issuance of a Trustee's Certificate to the Bank, in the amount of $22,128,484.05 as of February 6, 1991, App. 40, including accrued interest paid as late charges of *$9,804,332.05* from October 10, 1985, and *$4,986,900* paid as the purchase option price for MCJV's FF&E.

On appeal, the district court granted deference of the clearly erroneous standard of review to the bankruptcy court's conclusions of law,[33] App. 15, except for the following pertinent comments:

> The record in this case does not support the conclusion that the bank's nominee paid anything for the FF&E at the time of the closing. The record indicates that an appraisal was made of the buildings and this appraisal totaled $255,600,000. This appraisal does not indicate what value was assigned to the FF&E. *The record is clear that the bank placed no value on the FF&E arguing that it was fully depreciated.* (Emphasis added). App. 17.
>
> Another issue that caused some concern to this court was the award of interest to the bank when it appeared that *most of the interest was generated by the bank's unsuccessful appeals* of the adverse ruling on claim 502. *Generally, a party should not be awarded by receiving interest on a judgment which it has unsuccessfully appealed* (Emphasis added). App. 18.

Nevertheless, the district court reviewed the bankruptcy judge's conclusions of law concerning the award of interest to the Bank under the clearly erroneous standard, App. 18, and

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trustee or his sureties, FS § 95.02. Under Florida law, estoppel and laches are the only defenses a trustee has against the rights of a beneficiary to enforce the trust or a trustee's liability for the failure to discharge duties imposed by law.")

[33] *Compare, Salve Regina College v. Russell,* 111 S.Ct. 1217, 1224 (1991) ("When *de novo* review is compelled, no form of appellate deference is acceptable.")

held, "[i]t was within the discretion of the bankruptcy judge to award interest to the bank," App. 18.

In the remanded proceedings concerning the question of whether the Bank paid twice for MCJV's FF&E, the bankruptcy judge found that "the value of the MCJV FF&E, namely $4,986,900, was included in the $255,600,000 purchase price," App. 50, based on the following findings fact:

> At the Remand Hearing, the liquidating trustee, Mr. Smith, testified that he conveyed whatever interest he had in the MCJV FF&E and other personal property to the purchaser, and that the MCJV FF&E and other personal property was included in the purchase price of $255,600,000. *See, Transcript,* pages 24-25. App. 51.

In fact, Smith's testimony begins on page 42 of the cited transcript, and the trustee testified as follows:

> Q: [T]he trustee was responsible for exercising the purchase option under the Category A and B leases owned by MCJV . . . and you received $1,162,000 a[s] the closing net proceeds, is that right?
>
> A: Yes. Page 47.
>
> Q: Did you demand, or did your attorney at that time demand, that the Bank of New York agree to a modification of the contract of sale, as a result of the various decisions made on the true leases, which was provided in Paragraph 25 of Exhibit M [Contract of Sale]?
>
> A. . . . the purchaser recognizes the seller, Miami Center Liquidating Trust, can deliver in accordance with the agreement only such title, items, chattels, and matters that it has received by operation of the law from the debtors and the debtors-in-possession and that this agreement is governed by said limitations. Page 49.
>
> Q: How much did the bank claim were missing chattels? [The original cost was $7,775,000.]
>
> A: [T]here was *$4,659,709* worth of missing items from the original schedule of purchase orders. [After deduction of the alleged missing chattels, the remainder was *$3,115,291.*]

> Q: How much depreciation did the bank say had been attributable to the FF&E leased under the Category A and B leases?
>
> A: Thirty-six per cent [$2,799,000]. Page 54. [After deduction for missing chattels and depreciation, the remainder was *$316,291*.]
>
> Q: Did you enter into a settlement with the Bank of New York concerning missing chattels?
>
> A: Yes. Page 52.
>
> Q: [T]he bank settle[d] for $442,000?
>
> A: Yes. Page 54.
>
> Q: How much did the bank pay you for the FF&E owned by Holywell Leasing and Holywell Telecommunications Company?
>
> A: Nothing. Page 55.

The bankruptcy judge also found that

> [t]he $255,600,000 purchase price established by the Bank's plan was supported by an appraisal of the Miami Center dated November 15, 1984 by Charles F. Failla. . . . At page 28 of that appraisal and at page 44 of the transcript from Failla's deposition taken on October 18, 1985 . . . Mr. Failla estimated that all of the FF&E associated with the four leases had a *replacement cost* (Emphasis added) of $13,500,000 and allocated such amount for the value of all of the FF&E within the overall purchase price value for the Miami Center project. App. 52.

In fact, page 28 of Failla's appraisal concludes that the Miami Center's appraised value based on a "[Replacement] Cost approach" was *$284,048,296*, of which the FF&E was $13,500,000, and on pages 44-46 of Failla's deposition, Failla testified "I felt that the $13,500,000 was probably very appropriate for the equipment. . . . I'm not an equipment expert. . . . It [the market] would reflect what the income of the property would throw off. If there was any difference between the value of this equipment and the economic rent . . . that would be the capitalized value of all the furniture, fixtures and equipment. . . . [T]he leases have no semblance of value to me."

After remand, the district court affirmed without briefing. App. 12.

A panel of the Eleventh Circuit, consisting of Circuit Judges Barkett, Birch, and Dubina, issued an opinion without argument, which affirmed in part and dismissed in part for lack of jurisdiction, App. 3. The panel held:

> In addressing an appeal by Gould and Holywell seeking cancellation of the trustee's certificate, we concluded that the debtor's challenge was moot because the plan had already been substantially consummated, and that the cancellation of the certificate would strike at the heart of the plan. *MCLP*, 838 F.2d at 1556. . . . It is incumbent on this court to raise issues of mootness *sua sponte* [citation omitted]. As stated earlier, we previously have held that cancellation of the trustee's certificate would strike at the heart of the plan, *MCLP*, 838 F.2d at 1556, and have warned the debtors against repeated attempts to "sweeten the pot" by benefitting from the bank's funding while trying to negate the bank's corresponding rights. *See, In re Holywell Corporation*, 901 F.2d 931, 934 (11th Cir., 1990), *cert. denied*, 498 U.S. 1041, 111 S.Ct. 713, 112 L.Ed.2d 702 (1991). Because the circumstances surrounding the implementation of the plan have not changed since our earlier decision, we dismiss the appeal as to this issue on the ground of mootness. App. 8.

Insofar as the question of whether the Bank paid twice for MCJV's FF&E was concerned, the panel held:

> The bankruptcy court, in its findings on remand, relied upon the facts that the contract of sale specifically provided that the title to the FF&E would pass to the bank and provided for an abatement in price if for some reason title for the FF&E did not pass to the buyer. The contract does in fact contain these provisions. These facts are sufficient to uphold the bankruptcy court's finding that the bank paid for the FF&E as part of the purchase price for Miami Center. We therefore affirm the district

court's affirmation of the bankruptcy court's findings of fact as to the dollar amount at which the FF&E was valued and included in the trustee's certificate. App. 9.

The panel dismissed *sua sponte* for lack of jurisdiction the petitioner's appeal of the district court's judgment affirming the bankruptcy court's conclusion of law that the doctrines of *res judicata* and collateral estoppel barred relitigation of the allegation that "the Bank should not recover . . . under the Second Amendment to the Plan, because . . . 'The Bank of New York, and its attorneys, have engaged in a pattern of fraud'," 18, *supra,* on the grounds, quoting Fed.R.App. P. 3(c)[34] in part, App. 10.

A suggestion of rehearing *en banc* was filed on the grounds, quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988), that Circuit Judge Barkett had previously been recused from the proceedings in accordance with 28 U.S.C. § 455(a), because of the judge's relationship to the Bank's attorneys. The petitioner also relied on the Seventh Circuit's opinion, reported as *Russell v. Lane,* 890 F.2d 947, 949 (7th Cir. 1989), and argued that the judge's participation as a member of a panel which issued a non-argument opinion, affirming in part the district court's judgment based on misstating the petitioner's argument concerning the Eleventh Circuit's prior opinion and the plain language of 11 U.S.C. § 1127, 17, *supra,* and in part dismissing for lack of jurisdiction a substantial part of the appeal,[35] alleging that the Bank engaged in fraud and that the trustee

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[34] Fed.R.App.P. 3(c) provides, in part: "A notice of appeal also must designate the judgment, order or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal. . . . " The notice of appeal expressly stated that the district court concluded the Bank was entitled to a Trustee's Certificate under the Second Amendment of the Bank's plan.

[35] The issues concerning the Bank's fraud and the trustee's breach of fiduciary duty were specifically defined in a Civil Appeal Statement Form filed in accordance with the Eleventh Circuit's rules.

failed to act in accordance with the provisions of a court-approved plan, constituted a basis for vacating the panel's judgment and hearing *en banc*.

The petitioner also argued that "[t]he facts show that whether or not the Bank paid for the purchase of MCJV's property in the Miami Center's purchase price, the money transferred to the trustee on October 10, 1985, provided adequate means to pay MCJV" in accordance with Article IV of the Bank's plan, 8, *supra*, and that "[t]he panel's judgment that the abatement provision in the Miami Center's Contract of Sale 'is sufficient to uphold the bankruptcy court's finding that the bank paid for the FF&E as part of the purchase price for the Miami Center" sanctions fraud and imposes damages on the Miami Center Liquidating Trust for the trustee's failure to pay MCJV for the purchase of its property in accordance with the plan's provisions.

The petitioner argued that the Contract of Sale's abatement provision was irrefutable evidence of the fraudulent conduct of the Bank's attorneys, because the Miami Center's Closing Statement did not provide funds for the trustee's payment of the FF&E's purchase price to MCJV, 8, *supra*, the postconfirmation modifications of the Contract of Sale 7-8, *supra*, and the Bank failed to disclose that it had filed UCC-1 forms subordinating its lines to MCJV's rights under the FF&E leases, 4-5, n. 6, *supra*. The Eleventh Circuit denied the suggestion for rehearing *en banc* and Circuit Judge Barkett participated in the decision. App. 2.

REASONS FOR GRANTING THE WRIT

This case raises important questions concerning the judicial power of federal courts and the lack of uniformity of the common law mootness doctrine adopted by the various courts of appeal in bankruptcy proceedings based on the principle that substantial consummation of a confirmed plan precludes effective judicial relief.

1. THE ELEVENTH CIRCUIT'S JUDGMENT IS AN ABUSE OF JUDICIAL POWER AND AN ABANDONMENT OF THE COURT'S DUTY.

The Constitution provides that "the judicial power shall extend to all Cases, in law and equity, arising under this Constitution, [and] the Laws of the United States. . . . " Section 8, Clause 4 of Article I grants the power to Congress to enact "uniform laws on the subject of Bankruptcies throughout the United States." The equity jurisdiction of federal courts is the same in nature and extent as the equity jurisdiction of England from which it is derived, *Dodge v. Woolsey,* 59 U.S. 331, 347 (1856), and "[e]quitable relief in a federal court is of course subject to restrictions . . . explicit Congressional curtailment of equity powers must be respected," *Guaranty Trust Co. v. York,* 326 U.S. 99, 105 (1945).

A bankruptcy court must find its equitable powers in the jurisdiction and power conferred by Congress, *Bender v. Williamsport Area School District,* 475 U.S. 534, 541 (1986), and a bankruptcy court's equitable powers "can only be exercised within the confines of the Bankruptcy Code," *Norwest Bank Worthington v. Ahlers,* 108 S.Ct. 963, 968 (1988).

Story's *Treatise on Equity Jurisprudence,* Vol. 1, Ch. VII, states that "whether a conveyance be fraudulent or not, is declared to depend upon its being made 'upon good consideration, and *bona fide.* It is not sufficient, that it be upon good consideration, or *bona fide.* It must be both," and an implied trust is created on "the principle upon which courts of equity have proceeded . . . that a person who has gotten the estate of another, ought not, in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money," *Id.* at § 1219. It is a longstanding maxim of equity that "the person who made possible the loss must bear it," *In re Continental Casualty Co. v. Associated Plastics, Inc.,* 347 So.2d 822 (Fla. 3rd DCA 1977), because the equitable doctrine of unclean hands provides that "one who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice or unfairness will appeal in vain to a court of conscience even though in his wrongdoing he may have kept himself strictly within the law," *Matter of Garfinkle,* 672 F.2d

1340 (11th Cir. 1982), quoting *Peninsular Land Co. v. Howard,* 149 Fla. 772, 6 So.2d 384, 389 (1941).

Congress has determined that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees" entered in bankruptcy cases. App. 61. 28 U.S.C. § 158(d). The mandatory language of the statute indicates a clear intent that judicial review should not be precluded, except in the most limited circumstances and Congress has specified that a case is moot under only two provisions of the Bankruptcy Code, neither of which is applicable in this proceeding, 838 F.2d at 1553. *See, In re Joshua Slocum, Ltd.,* 922 F.2d 1081, 1084 (3rd Cir. 1990).

In *McCarthy v. Madigan,* 112 S.Ct. 1081, 1087 (1992), this Court held that "federal courts are vested with a 'virtually unflagging obligation' to exercise the jurisdiction given them. *Colorado River Water & Conservation Dist. v. United States,* 424 U.S. 800, 817-818 . . . (1976). 'We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.' *Cohens v. Virginia,* 6 Wheat 264, 404, 5 L.Ed. 257 (1821)," and as Justice Brennan explained in *Colorado River,* "only the clearest of justifications" warrant a federal court's decision to decline to exercise the jurisdiction provided by Congress, 424 U.S. at 819.

"The traditional use of the writ [of mandamus] in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so," *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943).

The propriety of the issuance of a writ of mandamus arises "when a court has no judicial power to do what it purports to do – when its action is not mere error but usurpation of power," *DeBeers Consolidated Mines Ltd. v. United States,* 325 U.S. 212, 217 (1945). In this case, the bankruptcy court lacked the power to confirm the Bank's amended plan, as modified by the Second Amendment, because in accordance with 11 U.S.C. § 1127(a), App. 58, the Bank could have modified the proposed plan at any time before confirmation but could not modify the plan so that such plan as modified failed to meet

the requirements of section 1122, and the Eleventh Circuit's prior opinion held that the Bank's plan, as modified by the Second Amendment, and confirmed by the bankruptcy court, failed to satisfy the requirements of 11 U.S.C. § 1122, 17, *supra,* quoting 913 F.2d at 880. Under 11 U.S.C. § 1127(b), App. 58, the Bank could have modified the plan at any time after confirmation and before substantial consummation, subject to the condition that such plan, as modified, met the requirements of § 1122, and "only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title," but the Eleventh Circuit's prior opinion held that the Bank's plan, as modified by the Second Amendment, failed to satisfy the requirements of 11 U.S.C. § 1129(a)(1) and (b)(1), *Id.* at 880-881. The circumstances clearly did warrant modification of the plan, because the Bank fraudulently failed to disclose that its liens were subordinate to MCJV's rights and the Bank was required to continue the leases in full force and effect in the event of MCLP's default, 3, *supra.* Thus, the Bank did not satisfy the Eleventh Circuit's definition of a "good faith purchaser," acting without knowledge of MCJV's adverse claim to ownership of the FF&E, 12, n. 21, *supra,* quoting 838 F.2d at 1554. The facts also show that either the Bank did not pay for MCJV's FF&E at the Miami Center's closing or the Bank took MCJV's money as a credit for is loan amount and accrued interest in excess of the amount due under the loan documents, 8, n. 12, *supra.*

2. THE ELEVENTH CIRCUIT'S MIAMI CENTER RULING IS IN CONFLICT WITH THE BANKRUPTCY MOOTNESS DOCTRINE ADOPTED BY THE OTHER COURTS OF APPEAL.

The Second Circuit's opinion, reported as *In re Chateaugay Corp.,* 10 F.3d 944, 952-53 (2nd Cir. 1993), citing *In re AOV Industries, Inc.,* 792 F.2d 1140, 1148 (D.C. Cir. 1986), has held:

> In bankruptcy proceedings, the mootness doctrine involves equitable considerations as well as the constitutional requirement that there be a case or

> controversy. . . . Constitutional and equitable considerations dictate that substantial consummation will not moot an appeal if all of the following circumstances exist: (a) the court can still order some effective relief, *Church of Scientology v. United States*, ___ U.S. ___, 113 S.Ct. 447, 449, 121 L.Ed.2d 313 (1992); (b) such relief will not affect "the re-emergence of the debtor as a revitalized corporate entity," *In re AOV Industries, Inc.*, 792 F.2d at 1149; (c) such relief will not unravel intricate transactions so as to "knock the props out from under the authorization for every transaction that has taken place" and "create an unmanageable, uncontrollable situation for the Bankruptcy Court," *In re Roberts Farms, Inc.*, 651 F.2d 793, 797 (9th Cir. 1981); (d) the "parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings," *Central States, Southeast and Southwest Pension Fund v. Central Transport, Inc.*, 800 F.2d 92, 96 (4th Cir. 1988) (citations omitted); and (e) the appellant "pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order . . . if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from," *In re Roberts Farms, Inc.*, 652 F.2d at 798.

In *Baker v. Drake, Inc.*, 35 F.3d 1348, 1354 (9th Cir. 1994), the Ninth Circuit held, citing *Church of Scientology* (a court can fashion some form of meaningful relief for an unlawful order) that if compliance with applicable law makes a plan unfeasible, confirmation should be denied and if a plan violates applicable law, substantial consummation should not moot the appeal. *See,* 10-11, *supra.*

In *Matter of King Resources Co.*, 650 F.2d 1326, 1332 (10th Cir. 1980), quoting the Ninth Circuit's opinion, reported as *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 194 (9th Cir. 1977), the Tenth Circuit held:

> "If we were to conclude that the appellant is correct, and that the plan was erroneously confirmed . . . then a decision to that effect could have some effect on the proceedings below. While much of the debtor's

> property has been liquidated, and many of the creditors have been paid, the plan still controls the actions of the trustee. . . . As a result, we are of the opinion that the order of confirmation is not moot. . . . "

A confirmation order should be reversed in its entirety if the procedural requirements for a court's exercise of the statutory authority to confirm a plan have not been satisfied. *Protective Committee for Indep. Stockholders of TMT v. Anderson,* 340 U.S. 414, 434-35 (1968), citing *National Surety Co. v. Coriell,* 289 U.S. 426, 436 (1933), and "a plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it," *Id.*

The principle that an appeal is not moot if all essential parties are before the court was also expressed in the Ninth Circuit's opinion, reported as *In re Sun Valley Ranchers, Inc.,* 823 F.2d 1373, 1374 (9th Cir. 1987), citing *Matter of Springpark Associates,* 623 F.2d 1377, 1379 (9th Cir.), *cert. denied,* 449 U.S. 956 (1980), which held "a debtor's failure to obtain a stay . . . followed by the sale of the debtor's property, did not moot the subsequent appeal because the creditor-purchaser was before the court." Thus, the Ninth Circuit concluded "[w]e decline to follow the Eleventh Circuit's contrary position."

In this case, the standards defined in *Combined Metals* and *Chateaugay* are satisfied. The Eleventh Circuit's prior opinion affirmed the district court's order reversing the bankruptcy court's order confirming the Bank's amended plan with respect to MCJV's claims and interests, 913 F.2d at 878. The Bank's amended plan did not satisfy the requirements of 11 U.S.C. § 1129(a)(1), *Id.* at 880. The Bank failed to disclose its intent to relieve the trustee of his statutory duty to pay postconfirmation income taxes, in accordance with the applicable tax laws, *see,* 112 S.Ct. at 1027, and the Bank has been held liable for negligent misrepresentation as the plan's proponent, 161 B.R. at 307. *See,* App. 59, quoting 11 U.S.C. § 1129(a)(2). The Bank's representations concerning the plan's feasibility were "materially false," *Id.* App. 60, quoting 11 U.S.C. § 1129(a)(11). The Bank's plan wrongfully subordinated the claim of an impaired creditor, to which the Bank's liens held a

junior priority, 913 F.2d at 880, also App. 60, quoting 11 U.S.C. § 1129(b)(1). *See,* 9, n. 6, *supra.*

The Bank agreed to indemnify the trustee, holding him harmless for his actions under the plan's provisions, *Id.* at 306, and, thus, *third party creditors would not be adversely affected* by the elimination of the Trustee's Certificate and the Bank could be required to disgorge the credit taken against the Miami Center's purchase price in excess of the amount due under the loan documents, 8, n. 12, *supra.* The Bank was a party to the proceedings, caused the creation of the Miami Center Liquidating Trust under the plan's provisions, 112 S.Ct. at 1024, and the trustee's appointment for its own fraudulent benefit.

The trustee conspired with the Bank's attorneys to cause dismissal as moot of the debtor's appeal of the bankruptcy court's order confirming the Bank's amended plan (Bkrtcy. S.D. Fla., *Transcript,* January 19, 1994, Wolff's testimony, p. 475), and instructed his attorney to file a motion to cause dismissal of the appeal as moot on the grounds that the plan was substantially consummated (*Id.,* Smith's testimony, p. 450). *See,* 838 F.2d at 1556. The trustee failed to act in accordance with the plan's provisions for the purchase of MCJV's property, 4, *supra,* and has consented to the imposition of $15,269,243 in accrued interest from October 10, 1985 through April 5, 1994, under the Trustee's Certificate issued to the Bank to limit the damages for negligent misrepresentation for which the Bank is liable as the plan's proponent in accordance with *Smith v. Bank of New York.*

CONCLUSION

This petition for a writ of mandamus should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5351

IN RE: HOLYWELL CORPORATION,

Debtor.

HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN Associates, MIAMI CENTER CORPORATION,

Plaintiffs-Appellants,

OLYMPIA & YORK FLORIDA EQUITY CORPORATION,

Plaintiff,

versus

BANK OF NEW YORK, FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust,

Defendants-Appellees.

On Appeal from the United States District for the Southern District of Florida

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(Filed Aug. 29, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

Before: BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-5351
Non-Argument Calendar

D. C. Docket Nos. 94-997-CV-KLR
94-14-ADV-PGH

IN RE: HOLYWELL CORPORATION,

Debtor.

HOLYWELL CORPORATION, THEODORE B. GOULD, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, MIAMI CENTER CORPORATION,

Plaintiff-Appellants,

OLYMPIA & YORK FLORIDA EQUITY CORPORATION,

Plaintiff,

versus

BANK OF NEW YORK, FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 30, 1997)

Before BIRCH, DUBINA, and BARKETT, Circuit Judges.

PER CURIAM:

Theodore Gould and Holywell Corporation appeal the district court's decision affirming the bankruptcy court's order providing for the issuance of a trustee's certificate to the Bank of New York in return for funds it provided to the liquidating trust and dismissing counter- and cross-claims against Smith and the Bank of New York. For the reasons set forth below, we affirm in part and dismiss in part for lack of jurisdiction.

The facts of this complex bankruptcy case, which has been transiting the courts of this circuit for more than ten years, have been well-detailed in numerous published decisions. *See, e.g., In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990). We therefore briefly outline only those facts relevant to this appeal: Gould and Holywell, appellants here, along with three other corporations owned or controlled by Gould, developed a hotel and office complex in Miami called the Miami Center. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S. Ct. 69, 102 L. Ed. 2d 46 (1988) (hereinafter *MCLP*). The Bank of New York (hereinafter "bank") was the primary lender for this endeavor and the largest creditor after the four corporations and Gould declared bankruptcy in 1984. *Id.* Another creditor of the bankruptcy estate was the Miami Center Joint Venture (MCJV), half-owned by Gould and half by Olympia & York, a non-debtor not a party here. *In re Holywell Corp.*, 913 F.2d at 875. MCJV, which had leased to the debtors all the furniture, fixtures, and equipment ("FF&E") used in Miami Center, filed claim 502 against the estate for unpaid rent on the FF&E. *Id.*

The bank submitted the plan of reorganization that the creditors chose to implement. *MCLP*, 838 F.2d at 1548.

Salient features of the plan included that the bank was to purchase Miami Center, including the FF&E that was the subject of claim 502, for a price of about 256 million dollars. *Id.* at 1549. Further, the plan provided for claim 502, because it was owed to a corporation partly controlled by one of the debtors, to be equitably subordinated to all other creditors. *Holywell,* 913 F.2d at 877. An amendment to the plan provided a contingency in case the subordination of claim 502 was reversed. That amendment, hereinafter the "second amendment," provided for a funding agreement by which the bank would advance to the trustee between $14 and $15 million to pay claim 502. *Id., MCLP,* 838 F.2d at 1549. If that occurred, the trustee would issue to the bank a "trustee's certificate;" in effect, the bank would be repaid for its funding of claim 502 after all the unaffiliated creditors had been paid, but before distribution of the remaining trust assets to the Gould-affiliated creditors and the debtors. *Holywell,* 913 F.2d at 876.

The bankruptcy court confirmed the plan, including the equitable subordination of claim 502, and appointed Smith as trustee. *Id.* The district court affirmed all but the subordination, which it reversed. *Id.* There were two separate appeals of the plan; one in which the debtors sought, *inter alia,* revaluation of the sale price of Miami Center and the cancellation of the provision for a trustee's certificate. *MCLP,* 838 F.2d at 1555. We reversed the district court's affirmance of the confirmation of the plan on the basis that the district court should have dismissed the appeal as moot. *Id.* at 1557. As part of that decision, we found that the bank had paid for the FE&E as part of the purchase price of Miami Center. *Id.* at 1556.

In a separate appeal, we upheld the district court's holding that claim 502 was improperly equitably subordinated. *Holywell*, 913 F.2d at 880. Given that the equitable subordination of claim 502 was reversed, the bank provided funds to the trustee as required by the second amendment. Accordingly, claim 502 consisting of unpaid rent on FE&E, late charges, the purchase price for FF&E, and interest, was paid. The banks's first action seeking a trustee's certificate was stayed as unripe.

The instant action arose once the claim for the certificate became ripe. The bank here filed a motion seeking issuance of the certificate as provided in the second amendment. The debtors filed an answer objecting to the issuance of a certificate and including counter-claims against the bank for fraud and conspiracy to injure another in a trade or business, and cross-claims against the trustee for breach of fiduciary duty and conspiracy to injure another in a trade or business. The bankruptcy court determined after a hearing that prior court decisions barred the debtor's objections to the issuance of the certificate as well as their counter-claims. The bankruptcy court later entered modified findings that held, in part, that the statute of limitations barred the debtors' cross-claims against Smith.

The district court affirmed in part but remanded for the bankruptcy court to make further findings regarding the amount of the certificate. Specifically, the district court found that the bank paid in excess of $22 million in satisfaction of claim 502. A portion of this payment, approximately $5 million, was for the purchase price of FF&E. The district court held that the certificate should include the five million only if the purchase price of

Miami Center had included payment for the FF&E. It remanded for further findings of fact on this issue.

On remand, the bankruptcy court found that the bank had paid for FF&E as part of its purchase price of Miami Center, relying on, *inter alia*, the facts that the contract of sale for Miami Center provided that title to the FF&E would also transfer, and provided for the abatement of the purchase price if for some reason the title to the FF&E did not pass. It also found that courts at various levels had decided the issue previously and those decisions constituted law of the case. The bankruptcy court ordered that the bank was entitled to a certificate in the amount specified in its first order and the district court affirmed.

On appeal, the debtors argue that the Eleventh Circuit previously has found that the second amendment was (1) void as a matter of law due to the bankruptcy court's failure to hold a hearing, in violation of 11 U.S.C. § 1129 and (2) did not satisfy the fairness requirements of 11 U.S.C. § 1122. They further maintain that a postconfirmation modification is void without notice and a hearing.

First, several of the debtors' contentions characterizing our prior findings in this case are erroneous. Contrary to the debtors' representations, we previously held that the subordination of claim 502, not the entire plan, did not satisfy § 1122. *Holywell*, 913 F.2d at 880. Moreover, we made no finding regarding the debtors' allegation that the bankruptcy court failed to hold a hearing on their challenge to the issuance of a trustee's certificate. *See generally id.* Finally, we did not impose liability on the bank to pay claim 502, but affirmed the district court's

reversal of the subordination of the claim and provided for payment of the claim as directed in the district court's order. *Id.* That order provided for the issuance of a certificate in the event that claim 502 was paid out of the bank's funds. *See id.* at 877.

The debtors argument that the second amendment is void as a matter of law because it was implemented without notice and a hearing, contrary to the provisions of 11 U.S.C. § 1127, is similarly unavailing. The debtors err in characterizing the second amendment as a postconfirmation modification. In fact, the second amendment was adopted shortly *before* the confirmation of the plan. *Holywell Corp. v. Bank of New York,* 59 B.R. 340, 352 (S.D. Fla. 1986), *vacated on other grounds by, MCLP,* 838 F.2d 1547 (11th Cir. 1988).

Both appellees argue that the law of the case precludes the debtors from attacking the trustee's certificate here. The law of the case doctrine provides that "findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case . . . on a later appeal." *Burger King Corp. v. Pilgrim's Pride Corp.,* 15 F.3d 166, 169 (11th Cir. 1994). Law of the case also precludes relitigation of issues decided by necessary implication in an earlier proceeding. *In re Justice Oaks II, Ltd.,* 898 F.2d 1544, 1550 n.3 (11th Cir.), *cert. denied,* 498 U.S. 959, 111 S. Ct. 387, 112 L. Ed. 2d 398 (1990).

In addressing an appeal by Gould and Holywell seeking cancellation of the trustee's certificate, we concluded that the debtor's challenge was moot because the plan had already been substantially consummated, and

that the cancellation of the certificate would strike at the heart of the plan. *MCLP,* 838 F.2d at 1556. Although the debtors may be correct that our previous mootness ruling lacks preclusive effect, they have not provided any argument to suggest that the mootness analysis is no longer applicable, other than a conclusory argument that we should impose liability on the bank. It is incumbent on this court to raise issues of mootness *sua sponte. See Brooks v. Georgia State Bd. of Elections,* 59 F.3d 1114, 1118 (11th Cir. 1995). As stated earlier, we previously have held that cancellation of the trustee's certificate would strike at the heart of the plan, *MCLP,* 838 F.2d at 1556, and have warned the debtors against repeated attempts to "sweeten the pot" by benefitting from the bank's funding while trying to negate the bank's corresponding rights. *See In re Holywell Corporation,* 901 F.2d 931, 934 (11th Cir. 1990), *cert. denied,* 498 U.S. 1041, 111 S. Ct. 713, 112 L. Ed. 2d 702 (1991). Because the circumstances surrounding the implementation of the plan have not changed since our earlier decision, we dismiss the appeal as to this issue on the ground of mootness.

The debtors argue that the bank's appraisal of Miami Center improperly valued the FF&E and, therefore, the price the bank paid for the Miami Center property did not include an amount for FF&E. They contend that the purchase price of the hotel should be increased. We review the fact findings of the bankruptcy court for clear error. *In re Southeast Bank Corp.,* 97 F.3d 476, 478 (11th Cir. 1996). The bankruptcy court, in its findings on remand, relied upon the facts that the contract of sale specifically provided that the title to the FF&E would pass to the bank and provided for an abatement in price if for some

reason title for the FF&E did not pass to the buyer. The contract does in fact contain these provisions. These facts are sufficient to uphold the bankruptcy court's finding that the bank paid for the FF&E as part of the purchase price for Miami Center. We therefore affirm the district court's affirmation of the bankruptcy court's findings of fact as to the dollar amount at which the FF&E was valued and included in the trustee's certificate.

Finally, the debtors argue that the bankruptcy court erred in denying them damages on their counter-claims and provide a whole laundry list of allegedly wrongful acts by the appellants. The debtors' notice of appeal specifies the judgments appealed from as the "February 16, 1995 finding that the Bankruptcy Court's decision that the Bank of New York was entitled to a Trustee's certificate should be affirmed in principle," and the judgment "affirming the Bankruptcy Court's findings" regarding the valuation of the trustee's certificate. R1-66. It does not identify that portion of the district court's judgment affirming the dismissal of the debtors' counter-claims, nor does it specify any other issues for which the debtors seek appellate review. A notice of appeal must identify the "judgment, order, or part thereof appealed from." Fed.R.App.P. 3(c). We have jurisdiction to consider only the judgments or orders identified in the notice of appeal unless the intent of the party to appeal other judgments or orders is readily apparent on the face of the notice. *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1528 (11th Cir. 1987), *aff'd*, 489 U.S. 169, 109 S. Ct. 987, 103 L. Ed. 2d 146 (1989). Where some portions of a judgment or order are expressly made part of an appeal, we may infer that the appellant did not intend to appeal other

unmentioned orders or judgments. *Id.* at 1529. Although the appellees have not raised this issue, we may examine jurisdiction *sua sponte*. *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1542 (11th Cir.), *cert. denied*, 508 U.S. 907, 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993). Because the debtors specified in their notice of appeal that they were appealing from the district court's orders regarding the issuance and amount of the trustee's certificate, we reasonably may infer that the other, unmentioned portion of the order was not intended to be part of the notice of appeal. *See Osterneck*, 825 F.2d at 1529. We therefore dismiss those claims not set forth in the notice of appeal for lack of jurisdiction.

AFFIRMED in part, DISMISSED in part for lack of jurisdiction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 94-0997-CIV-RYSKAMP

HOLYWELL CORPORATION, et al.,

Defendants/Debtors/ Appellants,

vs.

THE BANK OF NEW YORK, et al.,

Plaintiff/Appellee,

_____/

FINAL JUDGMENT AFFIRMING THE BANKRUPTCY COURT'S FINDINGS

In Re:

HOLYWELL CORPORATION, et al.,
Debtors.

_____

(Filed Oct. 2, 1995)

THIS CAUSE came before the Court upon the Bankruptcy Court's Supplemental Final Judgement and Supplemental Findings of Fact and Conclusions of Law on Remand, both dated July 7, 1995. This Court's February 16, 1995 remand order affirmed a substantial part of the Bankruptcy Court's earlier findings of fact and conclusions of law and judgment and remanded in part for an evidentiary hearing.

THE COURT has considered the new findings of the Bankruptcy Court and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the findings of the Bankruptcy Court are hereby AFFIRMED. The record on remand supports that the amount of $4,986,900.00, the option price for the MCJV FF&E, be included in the Trustee's Certificate. THE CLERK OF THE COURT SHALL CLOSE THIS CASE AND DENY ALL PENDING MOTIONS AS MOOT.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 2 day of Oct, 1995.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

copies provided:
Theodore B. Gould
Robert M. Musselman
Vance E. Salter
Herbert Stettin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 94-0997-CIV-RYSKAMP

HOLYWELL CORPORATION, et al.,

Defendants/Debtors/ Appellants,

v.

THE BANK OF NEW YORK, et al.,

Plaintiff/Appellee,

In Re:

HOLYWELL CORPORATION, et al.,

Debtors.

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FINAL ORDER AFFIRMING IN PART AND REVERSING IN PART

(Filed Feb. 16, 1995)

The cause is before the court on appeals by Theodore B. Gould (*Gould*) and Olympia & York Florida Equity Corp. (*O&Y*) from an order of the Bankruptcy Court dated March 9, 1994 and amended March 31, 1994. Gould raises the following issues: 1) whether the Bank of New York is entitled to a Trustee's Certificate, 2) if the bank is entitled to a Trustee's Certificate, was the amount of the certificate excessive, 3) whether the bankruptcy judge erred in denying Gould's claims against the Bank of New York for fraud and conspiracy, 4) whether the bankruptcy judge erred in denying Gould's claims against Fred Stanton Smith, individually and as trustee for breach of fiduciary duty and conspiracy with the Bank of New

York, and 5) whether the bankruptcy judge erred in ruling that the statute of limitations barred relief for the claims set forth in #3 and #4 above. O&Y raise seven points but all seem to be subsumed under Gould's points #1 and #2, viz, that no Trustees Certificate should have issued and, if it was proper, it was for an excessive amount of money. The standing of O&Y to appeal is not readily apparent since it will not receive any direct monetary benefit from this appeal. O&Y may benefit if money is returned to the trustee as O&Y may have claims against Gould who would benefit from a surplus of funds in the trust.

The court has considered all the points raised by the appellants against the long and tortured history of this seemingly endless bankruptcy litigation. The court has concluded that the only issue that merits discussion by this court is whether the Trustee's Certificate awarded by the bankruptcy judge was in the correct amount. The claims of Gould against the bank and the trustee have no merit. They have been resolved by prior decisions in this litigation. Furthermore, the bank's right to a Trustee's Certificate has been established by prior decisions. Also, the bankruptcy judge's determination that unpaid rent and late charges should be included in the Trustee's Certificate is supported by the evidence.

This court has attached hereto the orders of the bankruptcy judge dated March 9, 1994, and March 31, 1994. In order not to add to the volume of the decisions in this case, this court will adopt the pertinent findings of fact and conclusions of law found therein, insofar as this court concludes that they are not clearly erroneous and supported by the facts presented.

At the core of this controversy is claim number 502. This claim was filed by Miami Center Joint Venture (*MCJV*) against the debtor Miami Center Limited Partnership (*MCLP*) seeking over $14.4 million in unpaid rent, late charges, interest and the purchase option price for the furniture, fixtures and equipment (FF&E). (See March 9, 1994 order at p.5) On May 8, 1987, the bankruptcy court allowed claim 502 as follows:

Unpaid rent	$ 6,112,318
Late Charges	2,478,818
Purchase Price (fair market value)	4,986,900
Interest on purchase price	979,718
	$13,578,036

(See order dated March 9, 1994, p. 8) Since the trustee did not have the funds to pay this claim, the Bank of New York was ordered to pay the claim and on March 18, 1991, the bank paid MCJV the amount of the claim plus accrued interest for a total of $22,335,882.[1] After paying the claim, the bank moved for a Trustee's certificate. After further appeals, the matter was finally presented to the bankruptcy judge for final determination of the amount of the certificate. The bankruptcy judge determined the final

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[1] This was done as a condition to an expedited sale of the property. The Bank of New York's plan disallowed the claim of MCJV to the FF&E. The court required the Bank of New York to provide the funds necessary to pay the MCJV claim if the claim should be allowed. The bank was required to post a $15 million bond to insure compliance with this condition.

amount to be $22,128,484.05. (March 9, 1994 order p. 20). This determination is now before the court for review.

The court now directs its attention to the conclusions of law set forth by the bankruptcy judge of pp. 12-20 of the March 9, 1994 order. This court agrees with the reasoning of the bankruptcy judge in rejecting the objections of the appellants, with one exception. As noted by the Eleventh Circuit in *In re Holywell Corp.*, 874 F.2d, 780, 781 (11th Cir. 1989):

> This price included the purchase of the FF&E. The plan required the liquidating trustee to take any action necessary, including the exercise of the purchase options in the FF&E leases, to obtain title to the FF&E so that the trustee could convey title to the FF&E to the purchaser at closing. The plan also provided that the total price to be paid by the purchaser would be reduced by the value of the FF&E if for some reason the liquidating trustee could not obtain title to the FF&E.

The record in this case does not support the conclusion that the bank's nominee paid anything for the FF&E at the time of closing. The record indicates that an appraisal was made of the buildings and this appraisal totaled $255,600,000. This appraisal does not indicate what value was assigned to the FF&E. The record is clear that the bank placed no value of the FF&E arguing that it was fully depreciated. The bank conceded that "at most" it could be worth $2 million. The bank should get a Trustee's Certificate for the value of the FF&E that exceeded the value the bank's nominee paid at the time of closing. If no value was ascribed to the FF&E, then the bank would be entitled to no credit on the Trustee's

Certificate since it would not be paying twice for the FF&E. On the other hand, if the bank can show that it paid the full appraised value of $4,986,900 at the time of closing, it is entitled to full credit in that amount in the Trustee's Certificate.

After oral argument in this cause, the court called the parties in for further argument as to this issue. No party has been able to provide the court with any factual basis for the conclusion that the bank has paid twice for the FF&E. Since this issue was not resolved before the bankruptcy court, this cause should be remanded for further evidentiary hearings on this issue.

Another issue that caused some concern to this court was the award of interest to the bank when it appeared that most of the interest was generated by the bank's unsuccessful appeals of the adverse ruling on claim 502. Generally, a party should not be rewarded by receiving interest on a judgment which it has unsuccessfully appealed. The bankruptcy judge dealt with this issue on pp. 16-19 of the March 9, 1994 order. This finding must be reviewed by this court under the clearly erroneous standard. It is not a question of what this court would have done if it had been the bankruptcy judge. Accordingly, this court affirms the bankruptcy judge on this issue as this finding does not appear to be clearly erroneous. It was within the discretion of the bankruptcy judge to award interest to the bank.

For the reasons stated above, the bankruptcy judge's order of March 9, 1994 and March 31, 1994 are AFFIRMED except as to the award of the full amount of FF&E to the bank. This finding is REVERSED and the

matter REMANDED to the bankruptcy judge for further evidentiary findings on this issue.

DONE and ORDERED at the United States District Court, West Palm Beach, Florida this 16 day of February, 1995.

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES
DISTRICT JUDGE

cc:
Theodore B. Gould
Robert M. Musselman
Albert I. Edelman
Herbert Stettin
Vance E. Salter

EXHIBIT "B"

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re HOLYWELL CORPORATION, et al., Debtors.	Bankruptcy Court Cases No: 84-01590-BKC-PGH 84-01591-BKC-PGH 84-01592-BKC-PGH 84-01593-BKC-PGH 84-01594-BKC-PGH
THE BANK OF NEW YORK, Plaintiff, v. FRED STANTON SMITH, Liquidating Trustee, and debtors HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD, Defendants,	Adv.Pro.No. 94-0014-BKC-PGH-A

FINDINGS OF FACT AND CONCLUSIONS OF LAW
(Trustee's Certificate Issue)

(Filed March 9, 1994)

This adversary proceeding and two prior motions[1] relating to the same issue were heard on January 18 and

[1] In November, 1993, The Bank of New York ("Bank") filed a motion seeking issuance and payment of the Trustee's

19, 1994. Having reviewed the pleadings and memoranda submitted by the parties, considered the testimony and documentary evidence, and being otherwise fully advised, the Court hereby makes and enters the following findings of fact and conclusion of law:

I. Findings of Fact

A. Parties.

Although the Miami Center bankruptcies began in 1984 and initially involved hundreds of creditors, the "Trustee's Certificate" question involves four litigants:[2]

1. *The Debtors.* Debtor Theodore B. Gould ("Gould") developed the Miami Center office building and hotel project through a group of related corporations and partnerships. Gould owned all of the stock of debtor Holywell Corporation ("Holywell"), a holding company for his interests in Miami, in the Washington, D.C. area, and elsewhere. Holywell in turn owned 100% of the stock of debtor Miami Center Corporation ("MCC"), corporate general partner of two partnerships. Debtor Chopin Associates, a general partnership between Gould and MCC, owned the Miami Center real estate. Debtor Miami

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Certificate (C.P. 2465) and Fred Stanton Smith, Liquidating Trustee ("Trustee") filed a motion to determine the Bank's rights relating to the Trustee's Certificate (C.P. 2464).

[2] The Court has been advised that, as a result of a settlement of the last remaining claim of the United States Internal Revenue Service ("IRS"), the United States intends to terminate further participation in the Trustee's Certificate matter.

Center Limited Partnership ("MCLP") was a limited partnership; Gould and MCC were the sole general partners. Gould, Holywell, and MCC were each limited partners of MCLP as well.

2. *MCJV/O&Y.* Gould and a subsidiary of Olympia & York ("O&Y"), a major Canadian real estate company, formed another general partnership for the development of a second phase of the Miami Center project on prime downtown land next to the existing office building and hotel. The second phase was never built. The Miami Center Joint Venture ("MCJV") is a Florida general partnership owned 50%-50% By Gould and O&Y.

3. *The Bank.* loaned the debtors principal sums exceeding $197 million for the construction of the office building and hotel. When the Bank established the validity, extent, and priority of its first lien on the Miami Center project in these cases in 1985, the lien exceeded $234 million.[3] The Bank proposed a plan and an amended plan of reorganization (the "Plan")[4] that was approved by creditors, "by an overwhelming margin" over competing plans proposed by the debtors. The Plan was confirmed by this Court.[5]

4. *The Trustee.* The Bank's Plan provided that all property of the debtors would become part of the "Miami Center Liquidating Trust" on the effective date. Fred Stanton Smith was nominated as Trustee by the Bank and

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[3] Adv. Pro. 85-0160-BKC-TCB-A.

[4] Bank's trial ex. "A".

[5] *In re Holywell Corp.*, 54 B.R. 41, 42 (Bankr. S.D. Fla. 1985); Bank's trial ex. "C-1".

not opposed by any other party; he was appointed Trustee of the Liquidating Trust on August 12, 1985 and has served continuously since that date.

B. Purchase of Miami Center

An MAI appraisal valued the Miami Center complex – including the furniture, fixtures, and equipment in the buildings, but excluding MCJV's adjacent, undeveloped land – at $255.6 million. The Plan contemplated that Miami Center would be sold by the Trustee to a designee of the Bank[6] at that price; the Bank would pay cash above its mortgage lien for the property. The Bank also agreed to release its lien on some $32 million in cash collateral; these funds were the proceeds of sale of several properties in the Washington, D.C. area (the "Washington Properties"). Before the Bank proposed its Plan, this Court had authorized the sale of the Washington Properties on the Debtors' motion with the proviso that all such proceeds would be subject to this Court's jurisdiction and maintained in a segregated account by the debtors. The Plan authorized the Trustee to use the cash collateral to pay the hundreds of other creditors.

The sale of Miami Center was closed on October 10, 1985, and the Trustee paid most of the other creditors over the next few months. In March, 1986, the District Court affirmed the confirmation of the Plan, including the two amendments to it.[7]

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[6] M.C. Holding Partners, a partnership of subsidiaries of the Bank and its participating lenders.

[7] *Miami Center Limited Partnership v. The Bank of New York*, 59 B.R. 340, (S.D. Fla. 1986); Bank's trial ex. C-2.

C. MCJV's Furniture, Fixtures, and Equipment

Gould, as managing general partner of MCJV and also of debtor MCLP, signed two leases of furniture, fixtures, and equipment ("FF&E") in 1981. The FF&E was indispensable to the operation of the Miami Center hotel and office building. O&Y loaned MCJV $7,775,000 to fund the purchase, and non-debtor MCJV then leased the FF&E to debtor MCLP as lessee.

Gould never made any of the monthly lease payments from MCLP to MCJV as contemplated by the leases. This and similar issues were the subject of protracted New York City arbitration proceedings between O&Y and Gould. *In re Holywell Corp.*, 913 F.2d 873, 876 (11th Cir. 1900).[8]

MCJV as lessor filed a claim ("Claim 502") against debtor MCLP in 1985 in these proceedings, seeking over $14.4 million in unpaid rent, late charges, interest, and the purchase option price.[9] MCJV never sought to replevy or recover possession of the FF&E; MCJV sought only the money damages specified by the leases.

The Bank's amended plan proposed in March, 1985 characterized the leases as unperfected financial leases rather than "true leases". Since Gould was an insider and controlled both lessor (MCJV) and lessee (MCLP), the Bank's Plan also provided for the subordination of

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[8] Bank's trial ex. C-12.

[9] Each FF&E lease provided a purchase option to the lessee at a price equal to the market value of the FF&E at the time of exercise.

MCJV's lease claims to the rights of all creditors not affiliated with the debtors.

In June, 1985, however, this Court held that the FF&E leases were "true leases"; this ruling was later affirmed on appeal.

D. The Second Amendment

After this Court's "true lease" ruling, the Bank proposed its second amendment (C.P. No. 854).[10] As the District Court noted:

> The purpose of these modifications was to provide for a trustee's certificate to repay the Bank of New York for any outlay required to acquire the FF&E which was the subject of the [MCJV-MCLP] leases.
> 59 B.R. 340, 352 (S.D. Fla. 1986).

In essence, the Bank guaranteed that the Trustee would have sufficient money to pay allowed claims in classes 1 through 6 *and* to pay Claim 502, the FF&E lease claim, if certain conditions occurred. When those conditions occurred, the Bank would receive a "Trustee's Certificate" – basically a right of subrogation – entitling the Bank to a claim for the money it advanced. The Trustee's Certificate was to be junior to Classes 1 through 6. The amount of the Certificate is stated to be the amount paid by the Bank toward Claim 502.[11]

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[10] The Second Amendment, including the "Funding Agreement", begins at page 58 of Bank's trial ex. "A".

[11] This explains the District Court's determination in 1986 that the Certificate was "to pay the Bank of New York for *any*

The Eleventh Circuit, in reviewing other issues regarding Claim 502 in 1990, held:

> Because the plan's classification of MCJV and the amount of claim 502 was still in dispute as of this date, the Bank of New York executed a funding agreement in which it agreed to advance up to the full amount of claim 502 to the liquidating trustee in the event MCJV's classification was reversed. The trustee, in turn, issued to the Bank a trustee's certificate for the amount of *any funds* advanced by the Bank pursuant to the funding agreement.[12]
>
> *In re Holywell Corp.*, 913 F.2d 873, 877 (11th Cir. 1990); emphasis supplied.

The debtors appealed the confirmation order and specifically challenged the validity of the Plan's Second Amendment and Trustee's Certificate. The District Court held:

> The Bankruptcy Court concluded (Order on Remand, ¶ No. 81) that these modifications did not prejudice the debtors, and that since the plan had been approved by the requisite number of creditors, disclosure to those classes which had rejected the plan was not required by 11 U.S.C. § 1127.

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outlay required to obtain the FF&E". 59 Bankr. at 352; emphasis supplied.

[12] In actuality, the Trustee signed the Funding Agreement, but has not yet signed or issued a Trustee's Certificate to the Bank.

> This Court agrees with the Bankruptcy Court's conclusion that the adoption of amendments to the plan of reorganization subsequently confirmed by that court did not violate the applicable provision of the Bankruptcy Code, did not prejudice these appellants, and therefore does not constitute a basis for reversing the Confirmation Order. 59 B.R. at 352.

E. Amount of Claim 502

By 1987, MCJV claimed over $22 million under Claim 502 (C.P. 1582), and the objections had not yet been determined. This Court conducted evidentiary hearings and reduced by approximately $8 million MCJV's claims for the purchase price (market value) and other amounts under the FF&E leases. By Order entered May 8, 1987, this Court allowed Claim 502 as follows:

Unpaid rent	$6,112,318
Late charges	2,478,818
Purchase price (fair market value)	4,986,900
Interest on purchase price	979,718
Total	$14,557,754

In re Holywell Corp., 75 B.R. 793, 796 (Bankr. S.D. Fla. 1987); Bank's trial ex. "C-3".

But this was not the end of the disputes relating to Claim 502. The payment of $14.5 million by the Trustee to MCJV was complicated by the fact that the Trustee had acquired Gould's 50% partnership interest in MCJV. After determining the amount of Claim 502, this Court held:

> [Claim 502] is payable, of course, to Miami Center Joint Venture, a Florida partnership consisting of O&Y and the debtor, Gould. The

> trustee is vested with all of Gould's property rights and interests to the extent necessary to satisfy the confirmed plan with respect to these substantively consolidated estates. Therefore, the trustee is entitled to and has asserted his right to set off against this obligation of the estate Gould's partnership entitlement to the lessor's claim against the estate. 75 Bankr. at 796.

This Court instructed the Trustee to commence a separate adversary proceeding[13] for a determination of the respective interests of O&Y and the Trustee in the payment to MCJV.

By the summer of 1988, this Court determined that 100% of Claim 502 should be paid to MCJV for distribution to O&Y in accordance with a settlement agreement among O&Y, Gould, and the Trustee.

Since it appeared that the Trustee would not have sufficient funds to pay the entire amount, this Court noted that the Bank might be required to pay Claim 502 under the bond posted by the Bank.[14] This Court also held:

> The bank is concerned that payment through the bond will subject it to double payment for the true leases which the bank contends were included within the purchase price it paid for the Miami Center. However, no double payment

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[13] Adv. Pro. 87-0255-BKC-SMW-A.

[14] The District Court required the Bank to post a $15 million corporate surety bond in 1985 in order to assure MCJV that the Bank could perform under the Second Amendment's Funding Agreement.

> will occur since the bank will have those remedies provided in the plan, as modified, and as provided in the supersedeas bond. Therefore, *the bank is not left unprotected, but has a claim upon which it may anticipate distribution.*
> *In re Holywell Corp.*, 87 B.R. 712, 717 (Bankr. S.D. Fla. 1988); emphasis supplied (Bank's trial ex. "C-5").

This Court initially held that the Trustee would pay Claim 502 after calling on the Bank's bond and "guarantee of payment." *Id.*

F. Direct Payment

Three months later, however, this Court determined that the Trustee had no available funds and ordered the Bank to pay Claim 502 directly to MCJV (slip op. in Adv. Pro. 87-0255, Sept. 7, 1988; bank's trial ex. "C-6"). The Bank's appeals were unsuccessful and, on March 18, 1991, the Bank paid MCJV Claim 502 plus accrued interest. No party disputes that the Bank paid MCJV $22,335,882.13 in full payment of Claim 502 on that date.

G. Motion for Certificate

After the Bank paid, it moved for the issuance of a Trustee's Certificate (C.P. 2210). This Court heard the matter on April 25, 1991, and ordered that the Trustee's Certificate be issued for $22,184,484.05 as of February 6, 1991[15] (C.P. 2237; Bank's trial ex. "C-13").

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[15] This Court held that the date of February 6, 1991 and the lower Certificate amount were applicable because the Eleventh

The United States and other objectors appealed. The District Court declined to fully review the issue, holding that, in light of the Supreme Court's tax ruling four months earlier, the matter was not yet ripe for review;[16] the Trustee's Certificate issue would be moot if priority income tax liabilities made the Trust incapable of making any payment to the Bank under the Certificate.[17] The District Court held:

> ORDERED AND ADJUDGED that the bankruptcy court's decision to issue the Trustee's Certificate is and the same be hereby VACATED and remanded to the bankruptcy court. The bankruptcy court has already passed on the validity of the Trustee's Certificate, *and it need not reconsider that issue*. However, the bankruptcy court is instructed to reconsider the amount of the Trustee's Certificate once the trustee's tax liability is determined, and, if it is determined by the bankruptcy court that a Trustee's Certificate should be issued, then the bankruptcy court shall also determine its priority with respect to the other claims against the estate, including the United States' tax lien. The parties may then

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Circuit denied rehearing on February 6, 1991. $22,335,882.13 was paid by the Bank on March 18, 1991 because that was the balance of Claim 502 on that date; $22,184,484.05 was the balance on February 6, 1991. Bank's trial ex. "F" (C.P. 2252), pages 39-40.

[16] On February 25, 1992, the Supreme Court of the United States reversed decisions of this Court, the District Court, and the Eleventh Circuit relating to the income tax liabilities of the Trustee.

[17] *U.S. v. Bank of New York*, Case No. 91-0953-Civ-Ryskamp (slip op. June 26, 1992); Bank's trial ex. "C-14".

> pursue an appeal to this court from the bankruptcy court's determination, if they so desire.
>
> *Id.*, page 14 (emphasis supplied).

Thereafter, all federal and state income tax obligations of the Liquidating Trust were settled and paid. As part of a settlement following the hearings before this Court on January 18 and 19, 1994, all claims of the United States have been determined. These developments, and the fact that there are still several million dollars in the Trust, make the Trustee's Certificate issue ripe for decision after the District Court's remand.

II. Conclusions of Law

A. Objections, Cross-Claims, and Counterclaims

Before the Court are these objections, cross-claims, and counterclaims regarding the Bank's request for issuance and payment of the Trustee's Certificate:

1. *The Debtors.* The debtors admit Paragraph 12 of the Bank's Complaint, that "the Bank paid MCJV $22,335,882.13 in respect of Claim 502" on March 18, 1991. Nonetheless, the debtors allege that the Bank should not recover any part of that payment under the Second Amendment to the Plan because, among other things, "The Bank of New York, and its attorneys, have engaged in a pattern of fraud which was commenced in April, 1980, and has continued without abatement".[18] The

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[18] Counterclaim in Adv. Pro. 94-0014, paragraph 23. This pleading, dated January 12, 1994, does not appear in the docket index.

debtors' counterclaims seek $100 million, punitive damages, and other relief as against the Bank, and their cross-claims against the Trustee accuse the Trustee of a "breach of fiduciary duty and conspiracy to injure another in a trade, practice or profession".

The debtors' objections and claims are barred by prior decisions of this Court. The debtors' claims relating to the confirmation and consummation of the Plan, including the Second Amendment, were heard and determined adversely to the debtors at every level of the federal judiciary. The debtors' claims against the Bank and the Trustee have been asserted numerous times without success.[19] The debtors failed to adduce any competent evidence at trial to prove any such claims, or to establish any reason the Bank should not be issued the Trustee's Certificate pursuant to the confirmed Plan.

The debtors' attempts to knock out the Trustee's Certificate are merely another attempt to take advantage of the Bank's duties under the Plan – here, the advance of $22.3 million to pay Claim 502 – without letting the Bank enforce its *rights* under the Plan (here, the issuance of the Certificate). The Eleventh Circuit has repeatedly warned that the debtors cannot do that:

> Here, the debtors again attempt to tamper with the terms of the sale of the property. This

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[19] *In re Holywell Corp.*, 93 B.R. 780, 783 (S.D. Fla. 1988): "[the debtors] are barred by both *res judicata* and collateral estoppel from relitigating these issues in this action". See also the findings and conclusions in favor of the Bank and Trustee on identical claims asserted by the debtors in 1993 in Adv. Pro. 87-0627.

> would strike at a crucial element of the reorganization plan. Since the debtors failed to post an appeal bond, the reorganization plan was implemented; the plan has been substantially consummated. The debtors' efforts again to require the Bank to "sweeten the pot" after this principal transaction, the sale of the property, has been completed must fail.
>
> *In re Holywell Corp.*, 901 F.2d 931, 934 (11th Cir. 1990).

The debtors cannot simply ignore the terms of the confirmed Plan and the Second Amendment.

2. *O&Y/MCJV.* O&Y and MCJV filed an "Opening Statement" (C.P. No. 2501) in which they opposed the issuance of a Certificate to the Bank.

O&Y/MCJV argue that (a) the Second Amendment lacked, "requisite disclosure, evidentiary hearing, or due process", and (b) the Bank assumed Claim 502 without any right of recourse to the Trustee.

Although O&Y/MCJV's "Opening Statement" of January 11, 1994 refers to the submission of evidence to the Court at the hearing on January 18, 1994, no such evidence was in fact presented by O&Y or MCJV.

O&Y/MCJV's "due process" and disclosure objections lack merit. The Second Amendment shows that it was served on O&Y/MCJV, and the District Court remanded the matter to this Court in 1986 for further

evidentiary hearings and more detailed findings and conclusions.[20] The confirmation order stated clearly that the Second Amendment had been approved, and reported appellate decisions (in which O&Y/MCJV were themselves parties) described the operation of the Trustee's Certificate. For example, O&Y and MCJV appealed this Court's Order directing the Bank to pay Claim 502 and directing O&Y to make a $6.3 million payment to the Trustee pursuant to their written settlement agreement. In its decision in that appeal, the Eleventh Circuit described the Bank's, "funding agreement in which it agreed to advance up to the full amount of Claim 502", and the issuance of a "trustee's certificate for the amount of *any funds* advanced by the Bank pursuant to the funding agreement." *In re Holywell Corp.*, 913 F.2d 873, 877 (11th Cir. 1990); emphasis supplied.[21]

In another reported decision in which O&Y and MCJV were appellants, the Eleventh Circuit described the rationale for allowing the Bank to recover the funds paid for Claim 502; the Bank had paid the Trustee $255.6 million for the Miami Center project, and:

> This price included the purchase of the FF&E. The plan required the liquidating trustee to take any action necessary, including the exercise of the purchase options in the FF&E leases, to obtain title to the FF&E so that the trustee could convey title to the FF&E to the purchaser at

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[20] The Eleventh Circuit reviewed the procedural history at 913 F.2d 877.

[21] The funding agreement and form of trustee's certificate were part of the Second Amendment to the Plan; Bank's trial ex. "A" and "B".

> closing. The plan also provided that the total price to be paid by the purchaser would be reduced by the value of the FF&E if for some reason the liquidating trustee could not obtain title to the FF&E. *In re Holywell Corp.*, 874 F.2d 780, 781 (11th Cir. 1989).[22]

If the Bank paid the full purchase price for Miami Center (including the FF&E) *and* paid Claim 502 (the lease payment required to obtain title to the FF&E), the Bank would have paid twice for the FF&E. That is not consistent with the Plan and it is not equitable.

Additionally, O&Y and MCJV have no standing to oppose the issuance of the Certificate at this time and on this record. Any objections O&Y/MCJV had to the Plan and Confirmation Order were decided years ago.[23]

Further, this Court held previously that O&Y and MCJV have no claim against the Liquidating Trust (C.P. 2312); that determination was affirmed by the District Court and is now on appeal by O&Y to the Eleventh Circuit.[24]

3. *The Trustee.* The Trustee does not dispute the Bank's entitlement to a Trustee's Certificate, but claims that the amount of the Certificate should be reduced by over $11 million as a sanction for appeals taken by the Bank with respect to Claim 502. This argument was also

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[22] Bank's trial ex. "C-7".

[23] *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990).

[24] *Olympia & York Florida Equity Corp. v. Smith*, Case No. 92.945-Civ-Ryskamp (slip op. May 26, 1993); app. pending, 11th Cir. Case 93-4707.

made by the Trustee in April, 1991 when this Court first considered the question.

This Court ruled against the Trustee on that issue in 1991. Even now, the Trustee candidly agrees that, "not only the bank, but also the Debtors and MCJV, appealed nearly every court decision concerning Claim 502".[25] In 1987, this Court noted the complexity of the issues relating to Claim 502, the resulting delays, and the involvement of the Trustee:

> Only the reluctance of the *trustee's counsel* to fix the amount due and marshal the necessary assets to pay the obligation *has delayed payment, a delay endorsed by every affected party.*
>
> I presume all parties have felt it prudent to await the conclusion of appellate review of the confirmation order before implementing this feature of the plan, although the trustee immediately implemented the rest of the plan and was directed by this court to do so.
>
> The trustee is once again directed to implement the confirmed plan as expeditiously as is possible.
>
> *In re Holywell Corp.*, 75 B.R. 793, 795 (Bankr. S.D. Fla. 1987); emphasis supplied.[26]

This Trustee is a Plan trustee and not a statutory trustee in bankruptcy. As the "entity organized . . . for the

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[25] Trustee's "Motion to Determine The Bank of New York's Entitlement to a Trustee's Certificate and Amount Thereof", C.P. 2464, Nov. 12, 1993, p. 10.

[26] Bank's trial ex. "C-3"; at the time, the Trustee was represented by a different attorney and firm.

purpose of carrying out the plan", the Trustee is told by the Code that he, "shall carry out the plan". 11 U.S.C. §1142(a). The Plan, including the Second Amendment, as confirmed and then interpreted on a number of occasions by this Court and appellate courts, provides for the issuance of a Trustee's Certificate for "any outlay required to acquire the FF&E";[27] the amount of the Certificate, according to the Eleventh Circuit in 1990, should be, "the amount of any funds advanced by the Bank pursuant to the funding agreement."[28] Neither those rulings nor the Plan itself entitle the Trustee to cut the amount of the Certificate in half on the grounds that the Bank – at the same time as the debtors and O&Y/MCJV – exercised its lawful rights of appeal. The Trustee has not asserted that the Bank's appeals were frivolous or in bad faith; each of the appellate courts could award money and administer appropriate discipline, if that was the case.

The Trustee was not injured by those appeals. The Trustee has never paid any of Claim 502 at any time, since the Bank was directed by this Court to pay MCJV directly. The Trustee received payment from the Bank for the FF&E covered by Claim 502 on October 10, 1985, when the sale was closed. The Trustee has had the use of the Bank's "cash to close" and cash collateral since that time, and has received income on those funds. And even if the Bank had paid Claim 502 immediately after it became liquidated in amount in 1987, the Trustee would have had

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[27] *Miami Center Ltd. Partnership, supra,* 59 B.R. at 352 (S.D. Fla. 1986).

[28] *In re Holywell Corp., supra,* 913 F.2d 873, 877 (11th Cir. 1990).

to pay interest at 1% over prime from that date until repayment of the Certificate.

Any loss resulting from the interest on Claim 502 has fallen on the junior claimants who are beneficiaries of whatever funds or property may remain when the Trustee and his counsel have received any final fees.[29] Since the last report by the Trustee indicates that remaining cash is approximately $10 million, it is apparent that the Bank will not collect the entire $22.3 million it disbursed for Claim 502. The interest accrual on Claim 502, therefore, has ultimately harmed the Bank and not the Trustee; there does not appear to be any scenario under which the Bank will be able to collect everything it is due. But this was the risk the Bank agreed to take when it guaranteed the availability of sufficient cash to permit payment of Claim 502.

The Trustee no doubt believes, as a fiduciary, that he must do his best to present this issue to the Court for the benefit of the other claimants who consider themselves affected beneficiaries – the debtors and O&Y/MCJV. As detailed previously, however, both of these litigants participated themselves in the protraction, complexity, and appellate delays. And each of those groups is unlikely to receive a distribution in view of (a) the prior rulings of this Court and the Eleventh Circuit denying O&Y/MCJV's claim and (b) the current financial position of the Trust.

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[29] The priority of the Trustee's Certificate is specified by the Plan. It is behind Class 1 administration claims and behind the allowed pre-petition claims of all creditors other than those affiliated with the debtors.

Accordingly, the Court does not find that the Trustee's objections to the amount of the Certificate are an appropriate basis for departing from the Plan and the prior appellate rulings.

B. 1991 Ruling

The Bank's motion for a Trustee's Certificate in March, 1991 (C.P. 2210) was heard on April 25, 1991. The Bankruptcy Judge who heard the matter had four years of detailed experience with these cases, and had entered the 1988 rulings requiring the Bank to pay Claim 502.

That Bankruptcy Judge concluded that the Bank should be issued a Trustee's Certificate and that the amount should be determined as of the date of the Eleventh Circuit's mandate in the last appeal by O&Y/MCJV and the Bank relating to Claim 502 (February 6, 1991).

That Bankruptcy Judge heard and rejected the same objections that have been asserted here once again by the debtors, by O&Y/MCJV, and by the Trustee.

The Court concludes that the prior Bankruptcy Judge's ruling of May 2, 1991 (C.P. 2237) was correct and in conformance with the Plan and the prior appellate rulings on the issue.

III. Conclusion

Based upon the foregoing findings of fact and conclusions of law, a final judgment will be entered restating the May 2, 1991 Order of this Court (C.P. 2237), directing the Trustee to issue a Trustee's Certificate to the Bank in the

amount of $22,128,484.05, in substantially the form specified by the Plan, with an effective date of February 6, 1991.

DATED, at Miami, Florida, this 9 day of March, 1994.

/s/ Paul G. Hyman, Jr.
PAUL G. HYMAN, JR.
UNITED STATES
BANKRUPTCY JUDGE

Conformed Copies Furnished To:

Theodore B. Gould, *pro se*
Robert M. Musselman, Esq.
Albert I. Edelman, Esq.
Corali Lopez-Castro, Esq.
Herbert Stettin, Esq.
Vance E. Salter, Esq.
Jose F. De Leon, Esq.

Atty. Stetter is directed to mail a conformed copy of this order to all interested parties named below.

EXHIBIT "C"

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re HOLYWELL CORPORATION, et al., Debtors.	Bankruptcy Court Cases No: 84-01590-BKC-PGH 84-01591-BKC-PGH 84-01592-BKC-PGH 84-01593-BKC-PGH 84-01594-BKC-PGH
THE BANK OF NEW YORK, Plaintiff, v. FRED STANTON SMITH, Liquidating Trustee, and debtors HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD, Defendants,	Adv.Pro.No. 94-0014-BKC-PGH-A

ORDER ON MOTIONS FOR REHEARING

(Filed March 31, 1994)

This adversary proceeding was before the Court on March 24, 1994 (1:30 p.m.) upon the motions for rehearing filed and served by Fred Stanton Smith, Trustee (the

"Trustee") and by debtors Holywell Corporation ("Holywell") and Theodore B. Gould ("Gould").

Having reviewed the motions, memoranda, and pleadings, and having heard argument of counsel, it is hereby

ORDERED and ADJUDGED that the motions are granted in part and denied in part, as follows:

1. The Findings of Fact, Conclusions of Law, and Final Judgment entered by this Court on March 9, 1994 are modified, *nunc pro tunc,* in accordance with paragraphs 1 through 5 of the Trustee's Motion for Rehearing:

(a) The Debtors' cross-claims are barred as against Mr. Smith in his capacity as Trustee and individually. Paragraph 4 of the Final Judgment is applicable to Mr. Smith in both capacities.

(b) The Debtors' cross-claims against Mr. Smith as Trustee and individually are also barred by the applicable four-year statute of limitations, Section 95.11(3)(i) and (o), Fla. Stat. (1993). The evidence at trial was uncontroverted that the Debtors were aware of all pertinent facts by 1986, but did not assert their cross-claims until 1993. Finally, any claim based on fraud under a reorganization plan is required to be brought within 180 days; 11 U.S.C. § 1144.

2. Paragraph 2, page 2, of the Findings of Fact is modified, *nunc pro tunc,* in accordance with point (1) of the Debtors' motion for rehearing. The first sentence of that paragraph is modified to read, "Gould and Olympia & York Florida Equity Corp. ('O & Y'), formed a general partnership for the development of a second phase of the

Miami Center project on prime downtown land next to the existing office building and hotel".

3. Section C., page 5, of the Findings is hereby modified, *nunc pro tunc*, in accordance with points (5) and (6) of the Debtors' motion for rehearing:

(a) MCJV never sought to replevy or recover possession of the FF&E from the lessee, Debtor MCLP, before the effective date of the plan.

(b) The Bank's amended plan did not describe the leases as "unperfected financial leases"; that characterization was alleged by the Bank in Adversary Proceeding 85-0566-BKC-TCB-A a month after the promulgation of the amended plan.

4. In all other respects, the motions for rehearing are denied.

DONE and ORDERED, at Miami, Florida, this 31 day of March, 1994.

/s/ PAUL HYMAN
Paul G. Hyman, Jr.
United States
Bankruptcy Judge

Conformed copies furnished to:

Theodore B. Gould, *pro se*
Robert M. Musselman, Esq.
Albert I. Edelman, Esq.
Corali Lopez-Castro, Esq.
Herbert Stettin, Esq.
Vance E. Salter, Esq.
Jose F. De Leon, Esq.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re HOLYWELL CORPORATION, et al., Debtors.	Bankruptcy Court Cases No: 84-01590-BKC-PGH 84-01591-BKC-PGH 84-01592-BKC-PGH 84-01593-BKC-PGH 84-01594-BKC-PGH
THE BANK OF NEW YORK, Plaintiff, v. FRED STANTON SMITH, Liquidating Trustee, and debtors HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD, Defendants,	Adv.Pro.No. 94-0014-BKC-PGH-A

SUPPLEMENTAL FINAL JUDGMENT

(Filed June 29, 1995)

This adversary proceeding came before the Court on April 13, 1995 ("Remand Hearing"), in accordance with the District Court's order of February 16, 1995 ("Remand Order") which, while affirming in substantial part this Court's Findings of Fact and Conclusions of Law and Judgment, entered on March 9, 1994 and this Court's

Order On Motions For Rehearing, entered on March 31, 1994, remanded the matter to this Court for an evidentiary hearing. *Holywell Corp. v. The Bank of New York*, Case No. 94-0997-Civ-Ryskamp (*slip. op.* Feb. 16, 1995, p. 5). This Court has entered Supplemental Findings of Fact And Conclusions Of Law On Remand on even date and in conformity therewith, it is hereby:

ORDERED AND ADJUDGED that:

The record on remand supports that amount of $4,986,900.00, the option price for the MCJV FF&E, be included in the Trustee's Certificate since:

a) The Bank's designee paid $255,600,000.00 for the entire Miami Center Project at closing on October 10, 1985. That price included $4,986,900.00 paid to the liquidating trustee that would have been repayable by the trustee to the Bank's designee if the trustee had not been able to obtain title to the MCJV FF&E by exercising the purchase option in the leases pertaining to that property; and

b) The Bank made a second payment for the MCJV FF&E on March 18, 1991 when the Bank advanced the full amount of Claim 502 to MCJV. Claim 502, as paid, included $4,986,900.00 for the option price of the MCJV FF&E, plus interest.

DONE AND ORDERED in Miami, Florida, this 29th day of June, 1995.

/s/ Paul G. Hyman
PAUL G. HYMAN, JR.
UNITED STATES
BANKRUPTCY JUDGE

Copies Furnished To:

Theodore B. Gould, *Pro se*
Robert M. Musselman, Esq.
Albert I. Edelman, Esq.
Corali Lopez-Castro, Esq.
Vance E. Salter, Esq.
Herbert Stettin, Esq.

(Attorney Herbert Stettin is directed to mail a conformed copy of this order to all interested parties listed below, immediately upon receipt of same.)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In Re HOLYWELL CORPORATION, et al., Debtors.	Bankruptcy Court Cases No: 84-01590-BKC-PGH 84-01591-BKC-PGH 84-01592-BKC-PGH 84-01593-BKC-PGH 84-01594-BKC-PGH
THE BANK OF NEW YORK, Plaintiff, v. FRED STANTON SMITH, Liquidating Trustee, and debtors HOLYWELL CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD, Defendants.	Adv.Pro.No. 94-0014-BKC-PGH-A

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

(Filed June 29, 1995)

This adversary proceeding came before the Court on April 13, 1995 ("Remand Hearing"), in accordance with the District Court's order of February 16, 1995 ("Remand Order") which, while affirming in substantial part this Court's Findings of Fact and Conclusions of Law and

Judgment, entered on March 9, 1994 and this Court's Order On Motions For Rehearing, entered on March 31, 1994, remanded the matter to this Court for an evidentiary hearing. *Holywell Corp. v. The Bank of New York*, Case No. 94-0997-Civ-Ryskamp (*slip. op.* Feb. 16, 1995, p. 5). Specifically, the Remand Order requires this Court to supplement its Findings of Fact and Conclusions of Law to support this Court's conclusion that the Bank of New York paid twice for the value of MCJV's FF&E, namely, $4,986,900.00, such that the Bank of New York is entitled to full credit in that same amount in the Trustee's Certificate.

Having considered the additional exhibits and testimony offered by the parties and being otherwise fully advised in the premises, the Court hereby makes the following supplemental findings of fact and conclusions of law on remand.

Miami Center Limited Partnership ("MCLP") was the developer of the Miami Center Project, a luxury office, hotel and parking development in downtown Miami. MCLP is one of five related debtors that filed a Chapter 11 bankruptcy petition before this Court on August 22, 1984. The Miami Center Joint Venture ("MCJV") was a Florida partnership formed by Theodore B. Gould ("Gould"), a related debtor before this Court and by Olympia & York Florida Equity Corporation ("O&Y"). The Bank of New York (the "Bank") was the construction lender for the Miami Center Project, whose Amended Consolidated Plan of Reorganization (the "Plan")[1] was confirmed by Judge Britton on October 10, 1985.

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[1] On July 30, 1985, the Bank filed a second amendment to the amended plan, however, for purposes of this order, the second amendment does not alter the analysis contained herein.

On May 14, 1981, MCLP, as lessee, entered into two leases with MCJV, as lessor. The two leases encompassing furniture, fixtures and equipment ("MCJV FF&E") for use in the Pavilion Hotel are known as the Category A and Category B leases and are also often referred to as the "MCJV FF&E leases."[2] Both MCJV FF&E leases contained an option to purchase all of the MCJV FF&E at the fair market value, which Judge Britton ruled was $4,986,900.00.[3]

Under Article IV of the Plan, a purchaser designated by the Bank was to buy the Miami Center Project for $255,600,000.00, on the effective date of the Plan, pursuant to a Contract of Sale. The Plan allowed for the execution of a Contract of Sale substantially in the form

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[2] Distinct from these two MCJV FF&E leases are the Category C and Category D leases entered into between MCLP and Gould entities, which also encompass furniture, fixtures and equipment for use in the Pavilion Hotel and are known as the "Gould FF&E leases."

[3] Although the value of the MCJV FF&E was in dispute at the time of the October 10, 1985 closing, Judge Britton later ruled:

> The purchase option price [for the MCJV FF&E leases] is the fair market value of the leased property on the date the option was exercised, October 10, 1985, the effective date of the plan. I find that value to be $4,986,900.

In re Holywell Corp., 75 B.R. 793, 796 (Bankr. S.D. Fla. 1987).

The district court affirmed Judge Britton's ruling and the Eleventh Circuit affirmed the district court's affirmance. *See In re Holywell Corp.*, 75 B.R. 793 (Bankr. S.D. Fla. 1987) and *In re Holywell et al.*, 874 F.2d 780 (11th Cir. 1989). The aforementioned two cases were marked, respectively, as plaintiff's Exhibit J and K at the Remand Hearing.

as the one attached to the Plan as Exhibit A. The Contract of Sale dated October 10, 1985, which was introduced at the Remand Hearing as plaintiff's Exhibit M, was executed by the parties in conformity with the provisions of the Plan.

The following evidence supports the conclusion that the value of the MCJV FF&E, namely, $4,986,900.00, was included in the $255,600,000.00 purchase price:

1) Pursuant to both Contracts of Sale, the property to be sold consisted of land, ground leases, leasehold interests and improvements thereto, **chattels** and miscellaneous property. Further, under both Contracts of Sale, the personal property encompassed within the definition of **chattels** included certain furniture, fixtures, and equipment "located on or attached to or used in the operation of the Land . . . ," including the MCJV FF&E. In accord with the Bank's Plan, the liquidating trustee was required to deliver to the Bank or its designee, title to the Miami Center "free and clear of all leases, liens, encumbrances and contracts. . . . " The Plan further provided that at the closing, the Bank or its designee would receive "fee title to the FF&E covered by the MCJV FF&E Leases as a result of the exercise of the purchase option on the Miami Center Closing Date." Additionally, the Contract for Sale dated October 10, 1985 also provided:

(a) That the liquidating trustee was to execute the Funding Agreement and Trustee's Certificate at closing in case proceeds were disbursed in connection with the MCJV FF&E leases (*Id.*, p. 6).

(b) In the event the liquidating trustee failed to deliver any of the property covered by the MCJV FF&E

leases, the Bank's designee was to be entitled to an abatement of the purchase price by the value of such property (*Id.*, p. 10).[4]

2) On October 10, 1985, the effective date of the Plan, the liquidating trustee conveyed the Miami Center Project, including all of the FF&E, to the Bank's designee. The Bill of Sale delivered pursuant to the conveyance, marked as plaintiff's Exhibit H at the Remand Hearing, included schedules identifying the MCJV FF&E that was subject to the MCJV FF&E leases. Other personal property, namely, the Gould FF&E subject to the Gould FF&E leases was also conveyed.[5] The adjusted closing statement for the transaction, attached as Exhibit C to the Final Judgment which was introduced at the Remand Hearing as plaintiff's Exhibit N, showed that the Bank's designee furnished consideration in the form of cash and assumption/release of mortgage indebtedness totalling $257,101,388.70 at the closing.

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[4] In a related appeal, the Eleventh Circuit described the abatement provision as follows:

> The plan also provided that the total price to be paid by the purchaser would be reduced by the value of the [MCJV] FF&E if for some reason the liquidating trustee could not obtain title to the [MCJV] FF&E.

In re Holywell Corp., 874 F.2d 780, 781 (11th Cir. 1989).

[5] At the Remand Hearing, the liquidating trustee, Mr. Smith, testified that he conveyed whatever interest he had in the MCJV FF&E and other personal property to the purchaser, and that the MCJV FF&E and other personal property was included in the purchase price of $255,600,000.00. *See* Transcript at pages 24-25.

3) In an order dated January 29, 1986, Judge Britton found that the debtors' appraisal had valued all of the FF&E at $14,500,000.00 and that the Bank's appraisal had valued the entire Project at $255,600,000.00,[6] which included the value of all of the FF&E. Based on these appraisals, Judge Britton then found that $255,600,000.00 was a "fair and equitable" purchase price.[7] Those findings were affirmed by the district court and, in a further appeal, the Eleventh Circuit held that, pursuant to the Plan, the Bank would acquire the Miami Center property, "together with the furniture, fixtures, and equipment therein" for $255,600,000.00. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547, 1549 (11th Cir. 1988) *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed.2d

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[6] The $255,600,000.00 purchase price established by the Bank's Plan was supported by an appraisal of the Miami Center dated November 15, 1984 by Charles V. Failla. The appraisal was admitted into evidence at the Remand Hearing as plaintiff's Exhibit G. At page 28 of that appraisal and at page 44 of the transcript from Failla's deposition taken on October 18, 1985 (introduced at the Remand Hearing as plaintiff's Exhibit F), Mr. Failla estimated that all of the FF&E associated with the four leases had a replacement cost of $13,500,000.00 and allocated such amount for the value of all of the FF&E within the overall purchase price value for the Miami Center project. At page 41 of the deposition transcript, Mr. Failla testified that an allocation of $13,500,000.00 for all of the FF&E included "linens, furniture, fixtures and equipment for the hotel facility, cutlery, glass, [and the like], portions of the smart systems of the buildings, generally anything that would bring the property to a functioning entity."

[7] *See* Judge Britton's Order on Remand, dated January 29, 1986, C.P. No. 1188 in Case No. 84-01590-BKC-TCB at pages 29-31, marked as plaintiff's Exhibit I at the Remand Hearing.

46 (1988).[8] Those prior findings constitute the "law of the case" and are binding upon the parties. *Burger King Corp. v. Pilgrim's Pride Corp.*, 15 F.3d 166, 169 (11th Cir. 1994); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1350 (11th Cir. 1990). Collateral estoppel, or issue preclusion, also bars relitigation of these issues by the debtor/defendants. *In re St. Laurent*, 991 F.2d 672, 675 (11th Cir. 1993).

4) The Eleventh Circuit also affirmed prior rulings by the district court and the bankruptcy court that, "title to the [MCJV] FF&E passed to the liquidating trustee on October 10, 1985 [and] the trustee then sold the [MCJV] FF&E to the purchaser as part of the $255.6 million sale of the Miami Center Project." *In re Holywell Corp., supra*, 874 F.2d at 782. Again, these findings are part of the law of the case and are not subject to further review or challenge. *Burger King Corp., supra; In re St. Laurent, supra.*

The following evidence supports the conclusion that the value of the MCJV FF&E, namely, $4,986,900.00 was paid a second time when the Bank advanced monies to satisfy MCJV's proof of claim (claim number 502):

1) MCJV filed a proof of claim (claim number 502) in the amount of $13,578.036.00, for unpaid rent, late charges, and the fair market value of the MCJV FF&E leases.[9] The original Plan subordinated Claim 502 to the

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[8] The aforementioned Eleventh Circuit case was introduced at the Remand Hearing as plaintiff's Exhibit L.

[9] As previously indicated, Judge Britton ruled that the fair market value of the MCJV FF&E option to purchase was $4,986,900.00, which was affirmed by the district court and, on further appeal, was affirmed by the Eleventh Circuit. *See*

claims of other creditors with the exception of the claims of affiliated creditors and the interests of the debtors. The Plan was amended after a determination by Judge Britton that the FF&E leases were "true leases." Subject to certain conditions, all of which later occurred, the Bank agreed to make available sufficient funds to pay Claim 502 if the liquidating trustee could not otherwise make the payment.

2) On March 18, 1991, the Bank paid MCJV the amount of the 502 claim plus accrued interest for a total payment of $22,335,882.00, since the liquidating trustee did not have the funds to pay this claim. *See* Remand Order at page 3. In return, the Bank received a Trustee's Certificate for "any funds advanced by the Bank" under that feature of the Plan. *In re Holywell Corp.*, 913 F.2d 873, 877 (11th Cir. 1990).

3) In this Court's March 9, 1994 order, the amount of the Trustee's Certificate was assessed at $22,128,484.05. The Remand Order questioned only the $4,986,900.00 portion of that overall amount since the factual basis for this Court's conclusion that the bank's nominee paid anything for the MCJV FF&E at the time of the October 10, 1985 closing was not set forth.[10] In accordance with the Remand Order for a more detailed record regarding the

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footnote three of the instant Supplemental Findings Of Fact And Conclusions Of Law On Remand.

[10] The Remand Order affirmed this Court's determinations that the Bank was and is entitled to the issuance of the Trustee's Certificate pursuant to the Plan, and that the amount of the Certificate is to include unpaid rent, late charges, and interest.

double payment for the MCJV FF&E and given the foregoing factual bases and conclusions of law, it is hereby:

ORDERED AND ADJUDGED that:

The record on remand supports that amount of $4,986,900.00, the option price for the MCJV FF&E, be included in the Trustee's Certificate since:

a) The Bank's designee paid $255,600,000.00 for the entire Miami Center Project at closing on October 10, 1985. That price included $4,986,900.00 paid to the liquidating trustee that wouldhave been repayable by the trustee to the Bank's designee if the trustee had not been able to obtain title to the MCJV FF&E by exercising the purchase option in the leases pertaining to that property; and

b) The Bank made a second payment for the MCJV FF&E on March 18, 1991 when the Bank advanced the full amount of Claim 502 to MCJV. Claim 502, as paid, included $4,986,900.00 for the option price of the MCJV FF&E, plus interest.

The instant Findings of Fact and Conclusions of Law and Final Judgment supplement this Court's prior Findings of Fact and Conclusions of Law and Final judgment entered on March 9, 1994 and also supplement this Court's March 31, 1994 Order On Motions For Rehearing dated March 31, 1994, *nunc pro tunc.*

A separate Final Judgment will be entered on even date.

DONE AND ORDERED in Miami, Florida, this 29th day of June, 1995.

/s/ Paul Hyman
PAUL G. HYMAN, JR.
UNITED STATES
BANKRUPTCY JUDGE

Copies Furnished To:

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Herbert Stettin, Esq.

(Attorney Herbert Stettin
is directed to mail a conformed
copy of this order to all
interested parties listed below,
immediately upon receipt of same.)

STATUTORY PROVISIONS INVOLVED

1. Section 1122 of Title 11, *Bankruptcy Code* of 1978, as amended, *Classification of claims or interests,* provides:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
>
> (b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

2. Section 1125 of Title 11, *Bankruptcy Code* of 1978, as amended, *Postpetition disclosure and solicitation,* provides in part:

> (a) In this section –
>
> (1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan. . . .

3. Section 1127 of Title 11, *Bankruptcy Code* of 1978, as amended, *Modification of plan,* provides in part:

Modification of plan

(a) the proponent of a plan may modify such plan at any time before confirmation, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. After the proponent of a plan files a modification of such plan with the court, the plan as modified becomes the plan.

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title. Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title.

(c) The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

4. Section 1128 of Title 11, *Bankruptcy Code* of 1978, as amended, *Confirmation hearing*, provides:

(a) After notice, the court shall hold a hearing on confirmation of a plan.

(b) A party in interest may object to confirmation of a plan.

5. Section 1129 of Title 11, *Bankruptcy Code* of 1978, as amended, *Confirmation of plan*, provides in part:

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this plan.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

. . .

(8) With respect to each class of claims or interests –

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that –

(A) with respect to a claim of a kind specified in section 507(a)(1) or 507(a)(2) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive –

(i) if such class has accepted the plan, deferred cash payments of a

value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim; and

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim deferred cash payments, over a period not exceeding six years after the date of assessment of such claim, of a value, as of the effective date of the plan, equal to the allowed amount of such claim.

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(b) (1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and

> is fair and equitable, with respect to each class of claims or interests that is impaired under and has not accepted the plan. . . .

6. Section 158 of Title 28, the *Judicial Code, Appeals,* provides in part:

> (a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title.
>
> . . .
>
> (d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.